

CASE NOS. 16-1074; 16-1116

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

IN THE

**UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit**

DURHAM SCHOOL SERVICES, LP,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

**ON PETITION FOR REVIEW FROM
THE NATIONAL LABOR RELATIONS BOARD**

JOINT APPENDIX

Amanda A. Sonneborn
Brian M. Stolzenbach
SEYFARTH SHAW LLP
131 South Dearborn Street, Suite 2400
Chicago, Illinois 60603
(312) 460-5000

Counsel for Petitioner

Usha Dheenan
Milakshmi V. Rajapakse
NATIONAL LABOR RELATIONS BOARD
1051 Half Street, NE
Washington, DC 20570
(202) 273-2948

Counsel for Respondent

TABLE OF CONTENTS

	<u>Appendix Page</u>
Certified List of the National Labor Relations Board.....	1
Petition, filed April 14, 2015	10
Notice of Election, April 20, 2015.....	11
Stipulated Election Agreement, approved April 20, 2015	15
Tally of Ballots, issued May 8, 2015	18
Objections to Conduct Affecting the Results of the Election and Written Offer of Proof, filed May 15, 2015	19
Hearing Transcript, Case No. 32-RC-150090, June 2-9, 2015, pp. 16-24, 26-27, 37-39, 41-53, 55-58, 62, 72-74, 95-96, 104-05, 107-09, 113, 118-21, 123-24, 141, 238-39, 241-53, 278-86, 289-324, 328-65, 376-79, 386, 388, 390, 393, 400-03, 406, 411-12, 418-22, 432-44, 466-68, 493-94, 498-501, 509, 515-16, 558, 571, 578-611, 613-25, 629-34, 636, 644-45, 660, 664-65, 702-11, 735, 749-60, 776.....	29
Employer's Hearing Exhibits, No. 32-RC-150090, June 2-9, 2015	302
<u>Exhibits:</u>	
Exhibit 2 - Text Messages between Dorton and Rodney Smith in April.....	302
Exhibit 3 - Blank Time-Off Request Form	308
Exhibit 4 - Request For Time-Off Slips Approved by Dorton	310
Exhibit 5 - Sharquetta Wood's Approved Request for Time-Off Slip with Calendar	328
Exhibit 22 - Notation from Maria Lopez	331
Exhibit 23 - Written Warnings/Discipline for Attendance Violations.....	333
Exhibit 29 - Current Collective Bargaining Agreement	342
Exhibit 31 - 4/23/2015 Driver's Incident Report from Paula Moncado regarding Dorton	371
Exhibit 35 - Expense Documentation from Rodney Smith, dated 4/8/2015.....	373

Union’s Hearing Exhibits, No. 32-RC-150090, June 2-9, 2015	376
<u>Exhibits:</u>	
Exhibit 1 - Applebee’s Receipt	376
Post-Hearing Brief on Objections, filed June 18, 2015	380
Hearing Officer’s Report on Objections, issued June 30, 2015	422
Company’s Exceptions to Hearing Officer’s Report on Objections, filed July 14, 2015	437
Company’s Brief in Support of Exceptions to Hearing Officer’s Report on Objections, filed July 14, 2015	442
Regional Director’s Decision and Certification of Representative, issued July 29, 2015	489
Request for Review of the Regional Director’s Decision Overruling Employer’s Objections to the Election, filed August 12, 2015	502
Board’s Order Denying Review, issued November 4, 2015	553
Unfair Labor Practice Charge, 32-CA-165556, filed December 4, 2015	554
Complaint and Notice of Hearing with Attachments, filed December 21, 2016	555
Company’s Answer to Complaint, filed January 4, 2016	565
General Counsel’s Motion for Summary Judgment and attached exhibits, Case No. 32- CA 16556, filed January 11, 2016	571
Board’s Order Transferring Proceeding and Notice to Show Cause, Case No. 32-CA- 165556, filed January 13, 2016	580
Company’s Opposition to General Counsel’s Motion for Summary Judgment, filed January 27, 2016	581
Decision and Order of the National Labor Relations Board, <i>Durham School Services, L.P.</i> , 363 NLRB No. 129 (February 19, 2016)	588



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

April 14, 2016

Mark J. Langer, Esquire
Clerk of the Court
U. S. Court of Appeals
for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW, Room 5423
Washington, DC 20001-2866

Re: *Durham School Services, L.P. v. NLRB*
D.C. Cir No. 16-1074
Board Case No. 32-CA-165556

Dear Mr. Langer:

I am enclosing a certified copy of the agency record in this case. I am serving a copy of the certified list of its contents on the counsel named below.

Very truly yours,

A handwritten signature in black ink that reads "Linda Dreeben" followed by a stylized flourish.

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Encls.

cc: Amanda A. Sonneborn, Esq.
Brian Stolzenbach, Esq.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DURHAM SCHOOL SERVICES, L.P.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

No. 16-1074

CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD

Pursuant to authority delegated in Section 102.115 of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. § 102.115, I certify that the list below fully describes all documents, transcripts of testimony, exhibits, and other material constituting the record before the Board in Durham School Services, L.P. and Case No. 32-CA-165556, which took notice of the record in Case No. 32-RC-150090.

32-RC-150090

VOLUME I-

Transcript of Hearing
06.02.15 - 06.05.15 and 06.09.15

Pages
1-783

VOLUME II-

Board Exhibits
1(a-g)

Employer Exhibits
1-35

Union Exhibits
1-4

USCA Case #16-1074

Document #1608649

Filed: 04/14/2016

Page 3 of 9

VOLUME III-Pleadings

<u>Date</u>	<u>Document</u>	<u>Pages</u>
04.14.15	Petition	1
04.20.15	Notice of Election	1-4
04.20.15	Stipulated Election Agreement	1-4
05.08.15	Tally of Ballots	1
05.15.15	Employer's (Durham School Services, L.P.) Objections to Conduct Affecting Results of Election	1-4
05.19.15	Order Directing Hearing and Notice of Hearing on Objections	1-2
05.22.15	Employer's (Durham School Services, L.P.) Renewed, Corrected and Modified Request to Reschedule Hearing (with attachments)	1-15
05.22.15	Regional Director's Letter denying request for postponement	1-2
05.22.15	Employer's (Durham School Services, L.P.) Renewed and Modified Request to Reschedule Hearing for Good Cause for Only One Day (with attachments)	1-10
05.27.15	Regional Director's Order Rescheduling Hearing	1
06.12.15	Employer's (Durham School Services, L.P.) Motion for Extension of Time	1-3
06.12.15	Hearing Officer's Letter granting extension of time to file post-hearing briefs	1
06.16.15	Charging Party's (Local 853) Post Hearing Brief	1-34

USCA Case #16-1074

Document #1608649

Filed: 04/14/2016

Page 4 of 9

06.18.15	Employer's (Durham School Services, L. P.) Post Hearing Brief on Objections to Elections	1-42
06.18.15	Charging Party's (Local 853) Pre-Election Hearing Brief	1-34
06.30.15	Hearing Officer's Report on Objections	1-15
07.14.15	Employer's (Durham School Services, L.P.) Exceptions to the Hearing Officer's Official Report on Objections	1-5
07.14.15	Employer's (Durham School Services, L.P.) Brief in Support of Exceptions to the Hearing Officer's Official Report on Objections	1-47
07.21.15	Charging Party's (Local 853) Answer to Employer's Exceptions	1-39
07.29.15	Decision and Certification of Representative	1-13
08.12.15	Employer's (Durham School Services, L.P.) Request for Review	1-51
08.19.15	Union's (Local 853) Statement in Opposition Opposition to Request for Review	1-44
11.4.15	Board's Order	1-2

32-CA-165556

12.04.15	Charge	1
12.21.15	Complaint and Notice of Hearing	1-3
01.04.16	Answer to Complaint	1-6
01.11.16	General Counsel's Motion for Summary Judgment (with attachments)	1-200


USCA Case #16-1074

Document #1608649

Filed: 04/14/2016

Page 5 of 9

01.13.16	Order Transferring Proceeding to the Board and Notice to Show Cause	1
01.27.16	Employer's (Durham School Services, L.P.) Motion in Opposition of Motion of Summary Judgment (with attachments)	1-1128
02.19.16	Decision and Order (363 NLRB No. 129)	1-3



Gary W. Skidders
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

April 14, 2016

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Durham School Services, L.P.
Board Case Nos. 32-CA-165556 and 32-RC-150090

<u>Date</u>	<u>Documents</u>
	32-RC-150090
04.14.15	Petition
04.20.15	Notice of Election
04.20.15	Stipulated Election Agreement
05.08.15	Tally of Ballots
05.15.15	Employer's (Durham School Services, L.P.) Objections to Conduct Affecting Results of Election
05.19.15	Order Directing Hearing and Notice of Hearing on Objections
05.22.15	Employer's (Durham School Services, L.P.) Renewed, Corrected and Modified Request to Reschedule Hearing (with attachments)
05.22.15	Regional Director's Letter denying request for postponement
05.22.15	Employer's (Durham School Services, L.P.) Renewed and Modified Request to Reschedule Hearing for Good Cause for Only One Day (with attachments)
05.27.15	Regional Director's Order Rescheduling Hearing
06.05.15	Hearing Opened
06.09.15	Hearing Closed
06.12.15	Employer's (Durham School Services, L.P.) Motion for Extension of Time

06.12.15 Hearing Officer's Letter granting extension of time to file post-hearing briefs

06.16.15 Charging Party's (Local 853) Post Hearing Brief

06.18.15 Employer's (Durham School Services, L. P.) Post Hearing

06.18.15 Charging Party's (Teamsters Local 853) Pre-Election Hearing Brief

06.30.15 Hearing Officer's Report on Objections

07.14.15 Employer's (Durham School Services, L.P.) Exceptions to the Hearing Officer's Official Report on Objections

07.14.15 Employer's (Durham School Services, L.P.) Brief in Support of Exceptions to the Hearing Officer's Official Report on Objections

07.21.15 Charging Party's (Local 853) Answer to Employer's Exceptions

07.29.15 Decision and Certification of Representative

08.12.15 Employer's (Durham School Services, L.P.) Request for Review

08.19.15 Charging Party's (Local 853) Statement in Opposition to Request for Review

32-CA-165556

12.04.15 Charge

12.21.15 Complaint and Notice of Hearing

01.04.16 Answer to Complaint

01.11.16 General Counsel's Motion for Summary Judgment (with attachments)

01.13.16 Order Transferring Proceeding to the Board and Notice to Show Cause

USCA Case #16-1074 Document #1608649

Filed: 04/14/2016 Page 8 of 9

01.27.16 Respondent's (Durham School Services, L.P.) Motion in
Opposition of Motion of Summary Judgment (with attachments)

02.19.16 Decision and Order (363 NLRB No. 129)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DURHAM SCHOOL SERVICES, L.P.)	
)	
Petitioner)	
)	
v.)	No. 16-1074
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF system on the following counsel, who are registered CM/ECF users:

Amanda A. Sonneborn, Esq.
Michael Stolzenbach, Esq.
Seyfarth Shaw LLP
131 Dearborn Street, Suite 2400
Chicago, IL 60603

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, S.E.
Washington, D.C. 20570

Dated at Washington, D.C.
this 14th day of April 2016

FORM NLRB-502 (RC)
(4-15)UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.	32-RC-150090	Date Filed	04/14/2015
----------	--------------	------------	------------

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer
Durham School Services

2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)
27577 Industrial Blvd., Suite A, Hayward, CA 94545 & 72 Rickenbacker Circle, Suite A, Livermore, CA 94551

3a. Employer Representative - Name and Title
Ronald Mahler, General Manager

3b. Address (if same as 2b - state same)
same

3c. Tel. No.
(510) 887-6005

3d. Cell No.

3e. Fax No.
(510) 887-6336

3f. E-Mail Address
rmahler@durhamschoolservices.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.)
Transportation provider

4b. Principal product or service
Transportation service

5a. City and State where unit is located:
Hayward, CA and Livermore, CA

5b. Description of Unit Involved
Included: All full-time and regular part-time routers, payroll department employees, office administrators and dispatchers.
Excluded: All guards, supervisors and managers as defined by the Act.

6a. No. of Employees in Unit:
6

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes ☒ No ☐

Check One: ☒ **7a. Request for recognition as Bargaining Representative was made on (Date) by this petition** and Employer declined recognition on or about _____ (Date) (if no reply received, so state).

☐ **7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.**

8a. Name of Recognized or Certified Bargaining Agent (if none, so state).
None.

8b. Address

8c. Tel. No.

8d. Cell No.

8e. Fax No.

8f. E-Mail Address

8g. Affiliation, if any

8h. Date of Recognition or Certification

8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____
(Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (if none, so state)
None.

10a. Name

10b. Address

10c. Tel. No.

10d. Cell No.

10e. Fax No.

10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11a. Election Type: ☒ Manual ☐ Mail ☐ Mixed Manual/Mail

11b. Election Date(s):
April 17, 2015

11c. Election Time(s):
9:30 a.m. - 9:45 a.m. & 11:00 a.m. - 11:30 a.m.

11d. Election Location(s):
Employer's break rooms at Livermore and Hayward facilities

12a. Full Name of Petitioner (including local name and number)
Teamsters Local 853

12b. Address (street and number, city, state, and ZIP code)
2100 Marced Street, San Leandro, CA 94577-3247

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)
International Brotherhood of Teamsters

12d. Tel. No.
(510) 746-3311

12e. Cell No.
(510) 978-0282

12f. Fax No.
(510) 895-6853

12g. E-Mail Address
rsmith@teamsters853.org

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title
Dalisa Nisperos, Attorney

13b. Address (street and number, city, state, and ZIP code)
483 Ninth Street, 2nd Floor, Oakland, CA 94607

13c. Tel. No.
(510) 625-9700


13d. Cell No.

13e. Fax No.
(510) 625-8275

13f. E-Mail Address
dnisperos@beesonlayer.com

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)
Dalisa S. Nisperos

Signature


Title
Attorney for Petitioner

Date
April 14, 2015

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Form NLRB-707
(4-2015)



United States of America
National Labor Relations Board
NOTICE OF ELECTION



PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

SPECIAL ASSISTANCE: Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

PROCESS OF VOTING: Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. DO NOT SIGN YOUR BALLOT. Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

CHALLENGE OF VOTERS: If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. DO NOT SIGN YOUR BALLOT. Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-707
(4-2015)



**United States of America
National Labor Relations Board
NOTICE OF ELECTION**



VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: All full-time and regular part-time routers, payroll department employees, administrative employees, and dispatchers employed by the Employer at its facilities located at 27577 Industrial Boulevard, Suite A, Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California, during the payroll period ending April 12, 2015.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: Employees represented by a labor organization, professional employees, confidential employees, managers, guards, and supervisors as defined by the Act.

DATE, TIME AND PLACE OF ELECTION

Friday, May 8, 2015	9:30 a.m. to 9:45 a.m.	Employer's premises Break room 72 Rickenbacker Circle, Suite A, Livermore, California
Friday, May 8, 2015	11:00 a.m. to 11:30 a.m.	Employer's premises Break room 27557 Industrial Blvd., Suite A Hayward, California

EMPLOYEES FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.

**ALL BALLOTS WILL BE COUNTED IMMEDIATELY AFTER THE CONCLUSION OF THE LAST
VOTING SESSION.**

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-707
(4-2015)



United States of America
National Labor Relations Board
NOTICE OF ELECTION



	UNITED STATES OF AMERICA National Labor Relations Board 32-RC-150090	
OFFICIAL SECRET BALLOT (SAMPLE) For certain employees of DURHAM SCHOOL SERVICES, L.P.		
Do you wish to be represented for purposes of collective bargaining by TEAMSTERS LOCAL 853, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHANGE TO WIN?		
MARK AN "X" IN THE SQUARE OF YOUR CHOICE		
YES <input type="checkbox"/>		NO <input type="checkbox"/>
DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box. If you spoil this ballot, return it to the Board Agent for a new one. <small>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</small>		

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-707
(4-2015)



United States of America
National Labor Relations Board
NOTICE OF ELECTION



RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time where attendance is mandatory, within the 24-hour period before the mail ballots are dispatched
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (510)637-3300 or visit the NLRB website www.nlrb.gov for assistance.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
STIPULATED ELECTION AGREEMENT

Durham School Services, L.P.

Case 32-RC-150090

The parties **AGREE AS FOLLOWS:**

1. PROCEDURAL MATTERS. The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

2. COMMERCE. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

Durham School Services, L.P., a Delaware corporation with an office and place of business in Hayward, California, is engaged in the business of providing transportation services. During the past twelve months, the Employer derived gross revenues in excess of \$250,000, and purchased and received goods or services valued in excess of \$5,000 which originated outside the State of California.

3. LABOR ORGANIZATION. The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

4. ELECTION. A secret-ballot election under the Board's Rules and Regulations shall be held under the supervision of the Regional Director on the date and at the hours and places specified below.

DATE: Friday, May 8, 2015 **HOURS:** 9:30 AM to 9:45 AM

PLACE: Employer's premises
Break room
72 Rickenbacker Circle, Suite A
Livermore, CA 94551

DATE: Friday, May 8, 2015 **HOURS:** 11:00 AM to 11:30 AM

PLACE: Employer's premises
Break room
27577 Industrial Boulevard, Suite A
Hayward, CA 94545

If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

Initials: _____

5. UNIT AND ELIGIBLE VOTERS. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time routers, payroll department employees, administrative employees, and dispatchers employed by the Employer at its facilities located at 27577 Industrial Boulevard, Suite A, Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California; excluding employees represented by a labor organization, professional employees, confidential employees, managers, guards, and supervisors as defined by the Act.

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending April 12, 2015**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

6. VOTER LIST. Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.

7. THE BALLOT. The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of the need to have the Notice of Election and/or ballots translated.

The question on the ballot will be "Do you wish to be represented for purposes of collective bargaining by TEAMSTERS LOCAL 853, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHANGE TO WIN? The choices on the ballot will be "Yes" or "No"

8. NOTICE OF ELECTION. The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day of

Initials: _____

the election. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

9. ACCOMMODATIONS REQUIRED. All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

10. OBSERVERS. Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

11. TALLY OF BALLOTS. Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

12. POSTELECTION AND RUNOFF PROCEDURES. All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

DURHAM SCHOOL SERVICES, L. P.

(Employer)

TEAMSTERS LOCAL 853, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHANGE TO WIN

(Petitioner)

By /s/James N. Foster, Jr. 4/17/15
(Name) (Date)

By /s/ Dalisai Nisperos 4/17/15
(Name) (Date)

Recommended: /s/ Nicholas L. Tsiliacos
NICHOLAS L. TSILIACOS, Field Examiner
(Date) 4/17/15

Date approved: 4/20/15

/s/ George Velastegui
Regional Director, Region 32
National Labor Relations Board

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DURHAM SCHOOL SERVICES, L.P.

Employer

and

TEAMSTERS LOCAL 853, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHANGE TO WIN

Petitioner

Case No. 32-RC-150090

Date Filed

4/14/2015

Date Issued 5/8/2015

Type of Election
(Check one:)

- ☒ Stipulation
☐ Board Direction
☐ Consent Agreement
☐ RD Direction
Incumbent Union (Code)

(If applicable check
either or both:)

- ☐ 8(b) (7)
☐ Mail Ballot

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 7
2. Number of Void ballots 0
3. Number of Votes cast for Petitioner 7
4. Number of Votes cast for _____
5. Number of Votes cast for _____
6. Number of Votes cast against participating labor organization(s) 2
7. Number of Valid votes counted (sum of 3, 4, 5, and 6) 6
8. Number of Challenged ballots 1
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 7
10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has not been cast for Petitioner

For the Regional Director [Signature]

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For Durham School Services

For Teamsters Local 853

For _____

For _____

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

DURHAM SCHOOL SERVICES, L.P.

Employer

and

Case No. 32-RC-150090

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 853**

Petitioner

**EMPLOYER'S OBJECTIONS TO CONDUCT
AFFECTING THE RESULT OF THE ELECTION**

COMES NOW the Employer, Durham School Services, L.P., ("Employer" and/or "Company"), pursuant to §102.69 of the National Labor Relations Board, Rules and Regulations and Statements and Procedure and herewith files its Objections to Conduct Affecting the Results of the Election in the above matter.

The reasons for the Employer's objections are as follows:

1. A Board conducted Election was held at the Employer's customer service centers in Livermore, California and Hayward, California on May 8, 2015.
2. The polls were open from 9:30 a.m. to 9:45 a.m. at the Livermore Customer Service Center and from 11:00 a.m. to 11:30 a.m. at the Employer's Hayward Customer Service Center.
3. Upon the conclusion of the election, the Board determined that 4 votes were cast for the petitioning labor organization and 2 votes were cast against the petitioning labor organization. There was 1 challenged ballot.

4. **Objection – 1** -- The requisite laboratory conditions for a fair election were not present for the May 8, 2015 election referenced above inasmuch as the pro-union coercive conduct of a supervisor reasonably tended to interfere with the eligible voters' freedom of choice in the election and materially affected the outcome of the election. Such conduct tainted the election process.

5. **Objection – 2** -- The pro-union coercive conduct of a supervisor reasonably tended to interfere with the employees' freedom of choice whether to sign or not sign a union authorization card. Such conduct tainted the election process.

6. **Objection – 3** -- The Union, through its agents and representatives, coerced and threatened employees with being associated with unlawful activity by the exercise of a possible ballot challenge by the Employer, even though the exercise of such right is both lawful and protected. The objectionable conduct included the interference with the election by, among other things, creating the intimidation of voters that casting a ballot against the Union was supportive of unlawful acts and to avoid being associated with unlawful acts the employees needed to only vote for the Union. These improper and interfering actions restrained employees in the exercise of their rights and took place in spite of the right by either party to challenge ballots as part of the NLRB election process.

7. **Objection – 4** -- The Union, through its agents and representatives, coerced and intimidated employees into voting yes by advising employees that the Employer's lawful challenge was going to prevent pro-union employees from having the opportunity to exercise their right to vote.

8. **Objection – 5** -- By these and other similar acts, the Union prevented a fair election process from occurring consistent with the Act.

WHEREFORE, the Employer respectfully requests the election conducted by the Region on May 8, 2015, be set aside and that a second election be directed; and, if necessary, the Employer requests a full hearing on its objection, to be conducted on the record, before a Hearing Officer pursuant to Section 102.69(e) of the NLRB, Rules and Regulations and Statements and Procedure.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/ Geoffrey M. Gilbert

James N. Foster, Jr.
Geoffrey M. Gilbert
2730 North Ballas Rd, Suite 200
St. Louis, Missouri 63131-3039
Telephone: (314) 567-7350
Facsimile: (314) 567-5968

Attorneys for Employer

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2015, a true and correct copy of the above document was filed via electronically on the Board's website with the following individual:

George Velastgui
Regional Director
National Labor Relations Board, Region 32
1301 Clay St., Suite 300N
Oakland, CA 94612-5224

_____/s/ Geoffrey M. Gilbert

I further certify that on the 15th day of May, a true and correct copy of the above document was served via electronic mail upon the following individuals:

Rodney Smith, Organizer
Teamsters Local 853
International Brotherhood of Teamsters
2100 Merced Street
San Leandro, CA 94577-3265
rsmith@teamsters853.org

Dalisai Nisperos
Beeson, Tayer & Bodine
483 Ninth Street, 2nd Floor
Oakland, CA 94607
dnisperos@beesonayer.com

_____/s/ Geoffrey M. Gilbert

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

DURHAM SCHOOL SERVICES, L.P.

Employer

and

Case No. 32-RC-150090

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 853**

Petitioner

**EMPLOYER'S WRITTEN OFFER OF PROOF
SUPPORTING ITS OBJECTIONS**

COMES NOW the Employer, Durham School Services, L.P., ("Employer" and/or "Company"), pursuant to §102.69(a) of the National Labor Relations Board, Rules and Regulations and Statements and Procedure and herewith files its Written Offer to Support its Objections to Conduct Affecting the Results of the Election in the above matter.

A. Candi Comandad, the Employer's Router would, if called to testify, state that :

1. Michelle Dorton, the Employer's Lead Dispatcher is a supervisor as defined under Section 2(11) of the Act in that Dorton, *inter alia*, routinely counsels employees regarding job performance, grants time off, uses independent discretion in assigning work, uses independent discretion in directing work and spends significant periods as the highest ranking official of the Employer at the facility.
2. Dorton, prior to the filing of the Petition, used her supervisory status to coerce and intimidate employees, including Comandad, into signing a union authorization card. Dorton expressly told Comandad that she needed to sign a card.

3. Dorton, prior to the election threatened and coerced employees, including Comandad into voting in favor of being represented by the Union. Based on comments made by Dorton, Comandad believed she would be retaliated against if she did not support the Union.
 4. Dorton as well Union representatives advised eligible voters that the Employer was trying to deprive Dorton and Darlene Corley, two pro union employees, the right to vote by challenging their ballots.
 5. Dorton as well as Union representatives advised eligible voters that the Employer's tactic of challenging ballots was illegal and that to avoid being associated with illegal conduct, employees needed to vote yes.
 6. Comandad changed her vote to a yes vote based on the conduct of Dorton and the Union representatives.
 7. Comandad felt intimidated by Dorton and was not able to freely exercise her right to choose whether to sign a card or her right to vote for or against union representation.
- B. Corina Nelson, the Employer's Human Resources representative would, if

called to testify, state that:

1. Comandad and Shirley Myers, the Employer's billing representative, both told Nelson that they felt coerced and intimidated by Dorton to sign a card and vote in favor of being represented by the Union.
2. Comandad and Myers both advised Nelson that they were fearful of being retaliated against by Myers if they did not vote in favor of being represented by the Union.
3. Representatives of the Union actually view Dorton as a supervisor.
4. Comandad changed her vote based on Dorton's conduct including, but not limited to, her threatening and coercive behavior and Dorton's statements regarding the Employer's decision to challenge certain ballots. Comandad's sentiments are reflected in text messages to Nelson and Mahler

- C. Shirley Myers, the Employer's billing representative would, if called to

testify, state that:

1. Michelle Dorton, the Employer's Lead Dispatcher is a supervisor as defined under Section 2(11) of the Act in that Dorton, *inter alia*, routinely

counsels employees regarding job performance, grants time off, uses independent discretion in assigning work, uses independent discretion in directing work and spends significant periods as the highest ranking official of the Employer at the facility.

2. Dorton, prior to the filing of the Petition, used her supervisory status to coerce and intimidate employees, including Myers, into signing a union authorization card. Dorton advised Myers that she needed to sign a card.
3. Dorton, prior to the election, threatened and coerced employees, including Myers into voting in favor of being represented by the Union. Myers believed she would be retaliated against if she did not support the Union.
4. Dorton as well Union representatives advised eligible voters that the Employer was trying to deprive Dorton and Darlene Corley, two pro union employees, the right to vote by challenging their ballots.
5. Dorton as well as Union representatives advised eligible voters that the Employer's tactic of challenging ballots was illegal and that to avoid being associated with illegal conduct, employees needed to vote yes.
6. Myers felt intimidated by Dorton and was not able to freely exercise her right to choose whether to sign a card or her right to vote for or against union representation.
7. Myers changed her vote based on Dorton's conduct including, but not limited to, her threatening and coercive behavior and Dorton's statements regarding the Employer's decision to challenge certain ballots.

D. Susan Robbins, the Employer's payroll clerk in Livermore would, if called

to testify, state that:

1. Michelle Dorton, the Employer's Lead Dispatcher is a supervisor as defined under Section 2(11) of the Act in that Dorton, *inter alia*, routinely counsels employees regarding job performance, grants time off, uses independent discretion in assigning work, uses independent discretion in directing work and spends significant periods as the highest ranking official of the Employer at the facility.
2. Dorton, prior to the filing of the Petition, used her supervisory status to coerce and intimidate employees, including Myers and Comandad, into signing a union authorization card.

3. Dorton, prior to the election, threatened and coerced employees, including Myers and Comandad into voting in favor of being represented by the Union.
 4. Dorton as well Union representatives advised eligible voters that the Employer was trying to deprive Dorton and Darlene Corley, two pro union employees, the right to vote by challenging their ballots.
 5. Dorton as well as Union representatives advised eligible voters that the Employer's tactic of challenging ballots was illegal and that to avoid being associated with illegal conduct, employees needed to vote yes.
 6. Myers and Comandad felt intimidated by Dorton and was not able to freely exercise her right to choose whether to sign a card or her right to vote for or against union representation.
 7. Comandad changed her vote based on Dorton's conduct including, but not limited to, her threatening and coercive behavior and Dorton's statements regarding the Employer's decision to challenge certain ballots.
- E. Ron Mahler, the Employer's General Manager would, if called to testify,

state that:

1. Michelle Dorton, the Employer's Lead Dispatcher is a supervisor as defined under Section 2(11) of the Act in that Dorton, *inter alia*, routinely counsels employees regarding job performance, grants time off, uses independent discretion in assigning work, uses independent discretion in directing work and spends significant periods as the highest ranking official of the Employer at the facility.
 2. Dorton exercises independent discretion on a daily basis in assigning and directing the work of drivers. Dorton determines which drivers to utilize to cover routes.
- F. Paula I/n/u, one of the Employer's drivers and a member of the Union

would, if called to testify, state that:

1. Michelle Dorton, the Employer's Lead Dispatcher is a supervisor as defined under Section 2(11) of the Act in that Dorton, *inter alia*, routinely counsels employees regarding job performance, grants time off, uses independent discretion in assigning work, uses independent discretion in directing work and spends significant periods as the highest ranking official of the Employer at the facility.

2. Employees view Dorton as a supervisor.

3. Dorton disciplined Paula.

G. Debbie I/n/u, one of the Employer's drivers and a member of the Union

would, if called to testify, state that:

1. Michelle Dorton, the Employer's Lead Dispatcher is a supervisor as defined under Section 2(11) of the Act in that Dorton, *inter alia*, routinely counsels employees regarding job performance, grants time off, uses independent discretion in assigning work, uses independent discretion in directing work and spends significant periods as the highest ranking official of the Employer at the facility.

2. Employees view Dorton as a supervisor.

H. Adela Garcia, the Employer's dispatcher would, if called to testify, state that:

1. Michelle Dorton, the Employer's Lead Dispatcher is a supervisor as defined under Section 2(11) of the Act in that Dorton, *inter alia*, routinely counsels employees regarding job performance, grants time off, uses independent discretion in assigning work, uses independent discretion in directing work and spends significant periods as the highest ranking official of the Employer at the facility.

2. Employees view Dorton as a supervisor.

3. Garcia receives her daily assignments and work direction from Dorton.

The Employer reserves the right to allow the evidence to conform to the offer of proof when presented.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/ Geoffrey M. Gilbert

James N. Foster, Jr.
Geoffrey M. Gilbert
2730 North Ballas Rd, Suite 200
St. Louis, Missouri 63131-3039
Telephone: (314) 567-7350
Facsimile: (314) 567-5968

Attorneys for Employer

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2015, a true and correct copy of the above document was filed via electronically on the Board's website with the following individual:

George Velastgui
Regional Director
National Labor Relations Board, Region 32
1301 Clay St., Suite 300N
Oakland, CA 94612-5224

/s/ Geoffrey M. Gilbert

1 N, last name Dorton.

2 DIRECT EXAMINATION

3 Q BY MR. GILBERT: Good morning, Ms. Dorton. How are you?

4 A Fine.

5 Q Good. My name is Geoff Gilbert. I'm counsel for the
6 Employer. I'm going to ask you some questions today. I would
7 ask that if I ask a question that you don't understand or I use
8 a term that's not familiar to you, that you just ask me to
9 rephrase it. Is that acceptable?

10 A Yes.

11 Q Okay. And are you, ma'am, under the influence of any type
12 of medication today that might affect your ability to testify
13 truthfully?

14 A No.

15 Q Ma'am, are you currently employed?

16 A Yes.

17 Q And by whom?

18 A Durham School Services.

19 Q What's your current title?

20 A Dispatcher.

21 Q Okay.

22 (Counsel confer)

23 Q BY MR. GILBERT: Are there any other dispatchers at the
24 facility?

25 A Adella Garcia.

1 Q And so the record is clear, can you just kind of generally
2 describe for the Hearing Officer the nature of the Employer's
3 business?

4 A We transport special ed. kids.

5 Q So is it fair to say that the company is a bus company?

6 A Yes, it is.

7 Q And do we -- do you provide services for school districts?

8 A Yes.

9 Q What school districts do you provide services for?

10 A Fremont, San Leandro, San Lorenzo, Newark, Hayward.

11 Q And I believe you said you provide transportation for
12 special needs children. Is that true?

13 A Yes.

14 Q And can you describe for the record what a special needs
15 student is?

16 A A special needs student is a handicap student.

17 Q Does the Employer, in providing transportation to these
18 students, have to use wheelchairs?

19 A Yes.

20 MS. NISPEROS: Objection, relevance.

21 HEARING OFFICER KAUFMAN: I'm going to allow it. He's
22 just trying to -- it gives some background information about
23 the Employer's operation at this point, which is helpful for me
24 to write the decision. So I'm going to allow it.

25 Q BY MR. GILBERT: How many drivers, if you know, are

1 currently employed, roughly, by the Employer?

2 A Maybe about 105.

3 Q And, ma'am, to your knowledge, how many routes does the
4 Employer currently service for these various school districts
5 that you've identified?

6 A Probably 140, -50.

7 Q Ma'am, are the drivers that are currently employed by
8 Durham -- and strike that. Let me ask you this. Is there a
9 name for the location of the customer service center where
10 you're currently employed?

11 A The Hayward service center.

12 Q Hayward service center. And are the employees, the
13 drivers at the Hayward service center, to your knowledge,
14 represented by a union?

15 A Yes.

16 Q What union?

17 A Teamsters.

18 Q Do you know the Local, ma'am?

19 A No.

20 Q Okay. Is it the same Local, if you know, that was
21 involved in the election that occurred on May 8th, 2015?

22 A I believe so.

23 Q Ma'am, we talked about -- you said -- I think you said
24 there were 140 or 150 routes. Can you just describe for the
25 record the different types of routes that the Employer

1 performs, meaning --

2 MR. GILBERT: I'm just setting a -- I'm just trying to
3 elicit some testimony for the -- to --

4 Q BY MR. GILBERT: A.M, p.m., midday. Can you kind of
5 explain those to the Hearing Officer?

6 A They're routes that go door to door, and they pick up
7 kids, take them to school, go back in the afternoon, pick them
8 back up, and take them home.

9 Q Okay. And then are there other routes other than door to
10 door?

11 A No.

12 Q And so, does the Employer -- or do the employees perform
13 routes throughout the day?

14 A Yes.

15 Q Okay. So are there -- what's an a.m. route?

16 A An a.m. route is when you pick up the kids from home, take
17 them to school. And it may end -- it may start at 6:30 to
18 8:30. That's an a.m. route.

19 Q And what time, ma'am, would a.m. routes occur?

20 A Between 6:30 and 8:30, sometimes 9:30.

21 Q Okay. Are there what are called midday -- what is a
22 midday route?

23 A A route that it can begin at 10 to 12.

24 Q And what is a p.m. route?

25 A A p.m. route can start at 12 to 4.

1 Q To your knowledge, ma'am, do all of the drivers that are
2 currently employed at the Hayward service center perform an
3 a.m. route, a midday route, and a p.m. route on a daily basis?

4 A Not all drivers. The majority, yes.

5 Q What would -- okay. Would the exception to that be some
6 drivers don't do midday routes?

7 A Yeah.

8 Q Do all drivers that are currently employed at the Hayward
9 service center currently perform both a.m. and p.m. routes?

10 A No.

11 Q Do the majority?

12 A Yes.

13 Q Okay. To your -- do you know how many drivers currently
14 don't do all -- both a.m. and p.m.?

15 A One.

16 Q Just one. I apologize. Ma'am, do you wear a nametag
17 while you're at work?

18 A No.

19 Q Do you own a nametag?

20 A Yes. It's on my desk.

21 Q And do you know what that reads, the nametag?

22 A It reads head dispatcher.

23 Q Head dispatcher.

24 A Uh-huh.

25 Q Yes?

1 A Yes.

2 Q So when I asked you the position you were hired into, you
3 said dispatcher, correct?

4 A Uh-huh.

5 Q Yes?

6 A Yes.

7 Q So were you hired into dispatcher or head dispatcher, if
8 you know?

9 A Dispatcher.

10 Q Okay.

11 MR. GILBERT: May I approach?

12 HEARING OFFICER KAUFMAN: Yes.

13 MR. GILBERT: How would you like these? Is EX-1 fine?

14 HEARING OFFICER KAUFMAN: Employer 1.

15 MR. GILBERT: You want me to write out Employer?

16 HEARING OFFICER KAUFMAN: Yes.

17 MR. GILBERT: My handwriting though.

18 HEARING OFFICER KAUFMAN: ER is fine.

19 MR. GILBERT: ER, thank you.

20 HEARING OFFICER KAUFMAN: ER EX 1 will be fine.

21 MR. GILBERT: How about just ER-1?

22 HEARING OFFICER KAUFMAN: Yes.

23 (Employer Exhibit Number 1 Marked for Identification)

24 Q BY MR. GILBERT: Ma'am, I'm handing you a copy of what's

25 been marked as ER-1. And I would ask that you take a second to

1 review that document and let me know when you've completed your
2 review.

3 A Okay.

4 Q Have you ever seen this document before?

5 A Never.

6 Q Okay. Do you know who Mr. -- is it Jack Shultz is?

7 A Uh-huh. He's --

8 Q Is that a yes?

9 A Yes.

10 Q Who's Mr. Shultz?

11 A He was a GM at the Hayward service center.

12 Q So is it your testimony that, at the time you were hired,
13 were you hired as a lead dispatcher or a dispatcher?

14 A I was hired as a dispatcher.

15 Q Do you ever tell employees at the facility, drivers, that
16 you're the lead dispatcher?

17 A No.

18 Q What are your hours of work, ma'am?

19 A 10:30 to 7.

20 Q Can you describe for the record the duties and
21 responsibilities of the dispatcher position at the Hayward
22 customer service center?

23 A I answer phones and radios, and I cover routes.

24 Q Okay. Let's -- why don't we do it this way? When you get
25 to work at 10:30, tell me what you do.

1 A I begin covering the p.m. routes.

2 Q Can you describe for the record what that means?

3 A That it's the routes that driver either called off or
4 they're routes that have no assigned driver.

5 Q Okay. Why would there be occasion that routes wouldn't
6 have an assigned driver?

7 A Because we're short a driver.

8 Q How long have you been in the bus industry?

9 A Twenty-two years in July.

10 Q Is being short drivers something that's an issue in the
11 bus industry, to your knowledge, at least for the 22 years
12 you've been in the bus industry?

13 A Yes.

14 Q And so, is it fair to say from your testimony that there's
15 -- the other reason that you might be short a driver -- or you
16 might need to cover a route is because someone called off? Is
17 that what I heard you say?

18 A Yes.

19 Q Okay. And so, tell me what you do then to fill these
20 routes that have either been -- a driver has called off or you
21 don't have enough drivers to fill. What do you do, as the
22 dispatcher, to fill those runs?

23 A I refer to Versatrans and look up other driver's route
24 that may have a gap in their route that they can fill in for
25 the needs that I have, or either I'll call it out over the

1 radio and looking for volunteers. If I know that a driver is
2 in that area, I'll ask that driver are they able to help.

3 Q Okay. So I think you went through a number of different
4 things there. I think the first thing you mentioned is that
5 you consult Versatrans.

6 A Uh-huh.

7 Q Is that true?

8 A Yes.

9 Q What is Versatrans?

10 A Versatrans is a program that have all of the students'
11 information, the bus route, the school, emergency contacts.
12 And I can also use Versatrans to look up other drivers to see
13 where they are.

14 Q How long have you been the dispatcher at the Hayward
15 service center? Maybe you told me this before. I'm not trying
16 to belabor the record. But how long have you been actually
17 doing that job at the Hayward service center?

18 A I've been a dispatcher at the Hayward service center for
19 17 years.

20 Q Seventeen years. Do you actually need to consult
21 Versatrans about the routes or do you know the routes based on
22 your experience?

23 A I rely heavily on Versatrans.

24 Q What's that?

25 A I rely heavily on Versatrans.

1 A Yes.

2 Q And what is -- what do you call out over the radio? Tell
3 me, what verbiage do you use?

4 A I'll ask base to any unit that can help at a school. So
5 let's Spectrum that comes out at 2:15. I have six kids there.
6 Is anyone able to help?

7 Q And then what was the next process that you said you
8 engaged in after you did the callout on the radio?

9 A I didn't say.

10 Q I thought you said that you also would seek volunteers; is
11 that right?

12 A That's what I would do. You asked me -- that's what I
13 would do. I would call it out over the radio.

14 Q So other than calling it out on the radio and looking at
15 Versatrans, you don't -- that's all you utilize to --

16 A And my memory also.

17 Q Okay. And what do you -- how do you use your memory in
18 trying to assign the routes?

19 A Because I know that drivers -- I know the areas that
20 drivers drive in, and they -- and from the drivers volunteering
21 in the past.

22 Q And so, if you recall someone that, for example, is near
23 Spectrum School, as you just said --

24 A Uh-huh.

25 Q -- who has volunteered in the past, will you then contact

1 that person directly on the radio?

2 A Yes, or by phone.

3 Q And do you -- when you contact them by phone, for example,
4 what would be the verbiage that you would use?

5 A I would ask are you able to help me at 2:15 at Spectrum.

6 Q Are there ever occasions where you can't get anybody to
7 volunteer?

8 A Rarely, but yes.

9 Q What happens in those instances?

10 A If I can't get anyone to volunteer, then I take it to
11 Sandra.

12 Q And who's Sandra, ma'am?

13 A She's my supervisor, Sandra Wilson.

14 Q Do you know her title?

15 A Supervisor of operations.

16 Q Do you know the name of the general manager of the
17 facility?

18 A Yes.

19 Q Who is the general manager?

20 A Ryan Mahler.

21 Q And that's M-A-H-L-E-R?

22 A Uh-huh.

23 Q Is that a yes?

24 A Yes.

25 HEARING OFFICER KAUFMAN: Yes. Please answer yes or no

1 and in fact, that they had nothing to do with the initial
2 organizing, and that Ms. Dorton was the individual who
3 initiated the organizing effort. And I will note for the
4 record that this is the second organizing effort that Ms.
5 Dorton and her colleagues have engaged in in a six-month period
6 or seven-month period. And so, again, it would seem to me to
7 go against credibility that she needed an hourly driver to give
8 her the name of the Union that had just -- that these employees
9 had just had an election scheduled with six months prior. But
10 I will move on.

11 HEARING OFFICER KAUFMAN: Thank you.

12 Q BY MR. GILBERT: Ma'am, correct me if I'm wrong, did --
13 were you involved in a union organizing effort on behalf of the
14 staff employees in 2014?

15 A Can you specify your involved --

16 Q Sure.

17 A -- when you say involvement?

18 Q Just an eligible voter.

19 A Yes.

20 Q Okay. And at that time, did you have occasion to meet
21 with the Union?

22 A No, I don't think so.

23 Q In 2014?

24 A Yes. You talking about six, seven months ago?

25 Q Yes, ma'am.

1 A Yeah. I think that we called it off before we even had
2 meetings.

3 Q Okay. And at any time during that initial --

4 MS. NISPEROS: Objection to the relevance. This is not
5 related to the critical period or anything that happened during
6 the critical period.

7 HEARING OFFICER KAUFMAN: I'm going to overrule that
8 objection. Mr. Gilbert is trying to establish whether Ms.
9 Dorton has been actively involved in the organizing drive for
10 several reasons, one of which is whether he can move forward
11 with 611(c) status. So I'm going to overrule that objection.

12 Q BY MR. GILBERT: Did you, at that time, have any contact,
13 either verbally or in person, with any of the union
14 representatives, including Mr. Smith?

15 A Yes.

16 Q And who did you, at that time, meet with, ma'am, or have
17 contact with, either verbally or in person, during the initial
18 organizing effort?

19 A It was Stacy and Rodney.

20 Q Stacy and Rodney?

21 A Uh-huh.

22 Q Yes?

23 A Yes.

24 Q And I'm not trying to be rude when I say yes.

25 A I know.

1 Q It's just for the record.

2 A Uh-huh.

3 Q And how many times did you meet Rodney during the first
4 organizing efforts -- effort that occurred in 2014?

5 A I can't recall. Probably once or twice.

6 Q At that time, in 2014, did you obtain Mr. Smith's phone
7 number, if you recall?

8 A No.

9 Q And that was a bad question. So let me rephrase it. I
10 think I know your answer, but I didn't ask it very well.

11 A Uh-huh.

12 Q So is it no, you don't recall or no, you didn't obtain his
13 phone number?

14 A No, I didn't.

15 Q Okay, fair enough.

16 (Counsel confer)

17 MR. GILBERT: May I approach just to see the exhibit?

18 HEARING OFFICER KAUFMAN: Yes.

19 Q BY MR. GILBERT: And, ma'am, those text messages that are
20 contained within Employer's Exhibit 2, those are from 2015, if
21 you know? Is that true?

22 A I believe so, yes.

23 Q Okay. To your recollection, did you text Mr. Smith or any
24 other agent of the Union in 2014?

25 A I could have text Stacy. I'm not for sure.

1 A No.

2 Q Did you ever secure -- do you know what a union
3 authorization card is?

4 A Yes.

5 Q Did you ever secure union authorization cards on behalf of
6 the Teamsters Union? Strike that. Let me ask you another
7 question. I apologize. Did you ever assist the Teamsters
8 Union in getting union authorization cards signed by other
9 staff members?

10 MS. NISPEROS: Objection, assumes a conclusion.

11 HEARING OFFICER KAUFMAN: Overruled.

12 THE WITNESS: I didn't assist the Union, no.

13 Q BY MR. GILBERT: And that -- so I'm not -- but that basic
14 question, you didn't assist the Union. Did you assist anybody
15 in getting cards sent?

16 A I assist the driver that brought the cards.

17 Q Okay. So can you elaborate a little bit more on what
18 happened when the cards were signed?

19 A The cards were delivered to me.

20 Q To you.

21 A Yes.

22 Q By who?

23 A The driver.

24 Q And at that time, then did you approach other eligible
25 voters about signing cards?

1 A I approached the other staff members, office staff
2 members.

3 Q Okay. And did you ask them, at that time, to sign union
4 authorization cards?

5 A No, I didn't ask them to sign. I asked them did they want
6 one.

7 Q And where did this occur, ma'am?

8 A At the office.

9 Q Other than asking the individual -- other members of the
10 staff if they wanted one, did you say anything else about the
11 union authorization cards at that time?

12 A I told them that they can sign them if they want or they
13 don't have to.

14 Q Do you recall any of the staff members ever asking you any
15 questions about the authorization cards?

16 A No.

17 Q After you told the staff members that they could sign if
18 they wanted or didn't have to, did you then go back to them to
19 see if they had signed the cards?

20 A No.

21 Q Did you wait to see if they had signed the cards?

22 A No.

23 Q Did you -- were you involved, in any way, in the
24 collection of the union authorization cards that you passed out
25 to the other staff members?

1 A They brought them back to me.

2 Q At the time that you passed -- that you handed them to
3 them, did you give them instruction as to, if they did sign it,
4 to bring it back to you?

5 A No.

6 Q Did you ask any of them, when they brought it back to you,
7 why they actually chose to bring it back to you?

8 A No.

9 Q And when they brought those cards back to you, ma'am, what
10 did you do with the cards?

11 A I gave them to the driver.

12 Q Ma'am, are you involved, in any way, in the scheduling of
13 any union meetings for the staff members that were eligible to
14 vote in the May 8th, 2015 election?

15 A We all decided to meet.

16 Q If you would refer to Employer's Exhibit 2. Are there any
17 text messages between you and Mr. Smith about meetings?

18 A Yes.

19 Q And what were those text messages, ma'am?

20 A Hi, Rodney. Will be available on Monday at 6:30. I will
21 call you with meeting place.

22 Q Is it fair to say from that text message that you were
23 communicating, on behalf of the other staff members, your
24 availability for a meeting?

25 A We all agreed.

1 Q I didn't ask that question, ma'am. I asked if -- is it
2 fair to say that you were communicating on behalf of the other
3 staff members you're availability for a meeting?

4 A No.

5 Q Does the text message read we are available?

6 A Yes.

7 Q Who are you referring to?

8 A That would be the staff members.

9 Q Okay. How did you know the other staff members were
10 available?

11 A I think they came to me and asked about a meeting.

12 Q And what did you tell them when they came to you and asked
13 you about a meeting?

14 A That I would call Rodney and find out.

15 Q And that's what you did, right?

16 A Uh-huh.

17 Q Yes?

18 A Yes.

19 Q Did you get their availability from them, that is the
20 other staff members?

21 A Yes.

22 Q So is it fair to say that you communicated the
23 availability of the other staff members for a meeting to the
24 Union?

25 A Yes.

1 Q Did you have any involvement in the selection of the
2 location for the meeting?

3 A No.

4 Q Who decided that, if you know?

5 A I think -- yes, I did. Yes, I did.

6 Q What was your involvement?

7 MS. NISPEROS: I'm sorry, I didn't hear that testimony.

8 HEARING OFFICER KAUFMAN: Could you repeat the question
9 and could you repeat the answer please?

10 MR. GILBERT: Sure.

11 Q BY MR. GILBERT: Did you have any involvement in the
12 selection of the location of the meeting?

13 A Yes.

14 Q And what was your involvement?

15 A I asked Rodney could he meet us at TOGO's because Shirley
16 wanted to meet closer to her daughter's school.

17 Q And how many meetings do you recall attending with other
18 staff members regarding the Union's organizing effort that
19 culminated in the May 8th, 2015 election?

20 A One other one was Steve.

21 Q And who is Steve, ma'am?

22 A The Union, one of the Union reps. Organize like --

23 Q Do you recall how that meeting was arranged?

24 A No, I don't recall.

25 HEARING OFFICER KAUFMAN: Excuse me, Ms. Dorton, do you

1 know Steve's last name?

2 THE WITNESS: No.

3 Q BY MR. GILBERT: Did you ever exchange any text messages
4 with Steve about the Union's organizing efforts?

5 A No.

6 Q So, Ms. Dorton, as you sit here, you do not recall how you
7 learned about the second meeting with Steve, is that a fair
8 statement?

9 A I learned the second meeting was through Rodney.

10 Q And how did Mr. Smith advise you about the second meeting?

11 A I believe he either called me or text me.

12 Q And can you refer to those text messages? I don't have
13 them in front of me. I apologize again. But do you see any
14 reference to the second meeting in there?

15 A What is the hi, Rodney, we can meet on Thursday at 6:30.

16 Q And that's the second meeting then?

17 A Yes.

18 Q So again, is it fair to say that you were communicating
19 with Mr. Smith the availability of the staff members to meet
20 regarding the Union's organizational efforts?

21 A Yes.

22 Q And did you, ma'am, have any involvement in the selection
23 of the location of that meeting?

24 A Yes.

25 Q What was your involvement?

1 A I gave him a place where we could meet.

2 Q And what was that the location that you selected?

3 A Yes.

4 Q What was the location?

5 A Applebee's.

6 Q And then did you communicate to any other staff members
7 that the Union was available to meet at 6:30 on Thursday at
8 Applebee's?

9 A Yes.

10 Q And with respect to the first meeting, did you communicate
11 to the employees, the other staff members that were eligible to
12 vote in the May 2015 election that the meeting would take place
13 at TOGO's?

14 A Did I let who know?

15 Q Did you let the other staff members know?

16 A Yes.

17 Q And during the period of time between the filing of the
18 petition or during the organizing effort by the Union, did you
19 encourage -- were you supportive of the Union's efforts to
20 organize?

21 A For myself, yes.

22 Q And did you encourage the other employees to vote for the
23 Union?

24 A No.

25 Q Did you have a phone call with -- do you know an employee

1 by the name of Candi?

2 A Yes.

3 Q What's Candi's last name, if you know?

4 A Comdamao.

5 Q Do you know how to spell it?

6 A C-O-M-D-A-M-A-O I think.

7 Q And can you state for the record what Mrs. Comdamao's
8 position is?

9 A She's a router.

10 Q Was she an employee eligible to vote in the May 8th, 2015
11 election?

12 A Was she eligible?

13 Q Yes, ma'am.

14 A I would think so, yes.

15 Q Okay. Was the router position one of the positions that
16 was covered by the election agreement, if you know?

17 A Yes.

18 Q Okay. And was -- did you have a conversation with Ms.
19 Comdamao on the night before the election?

20 A Yes.

21 Q On the telephone?

22 A Yes.

23 Q What did -- and what was the subject matter of that
24 conversation?

25 A We were talking about the election.

1 Q Okay. And what was said and by whom, if you recall?

2 A She was saying that she didn't know what she was going to
3 do.

4 Q And what did you say in response, ma'am?

5 A I told her to follow her heart.

6 Q Is that all that you said?

7 A Yes.

8 Q Is it your testimony that you didn't encourage Ms.

9 Comdamao during that conversation at all to vote --

10 A Not at all.

11 Q Not at all, okay. Was anybody else present on the phone
12 during that conversation?

13 A No.

14 Q How long did the conversation last?

15 A Probably about 10 or 15 minutes.

16 Q I'm not trying to be glib when I say this, but obviously
17 telling her to follow your heart doesn't take 10 or 15 minutes.

18 Can you recall anything else that was said during the
19 conversation?

20 A We just had other conversations about work. Nothing
21 really important.

22 Q Did you talk to Ms. Comdamao about the Union election
23 prior to the night before the election?

24 A Yes.

25 Q How many occasions?

1 A Probably twice.

2 Q And what was your message to her during those
3 conversations?

4 A She was talking to me. She was giving me her take -- her
5 outtake on the Union.

6 Q Okay. And did you respond in any way during those
7 meetings?

8 A Yes.

9 Q What did you tell her?

10 A To follow her heart.

11 Q Did you ever -- do you know an employee by the name of
12 Shirley Myers?

13 A Yes.

14 Q What's Ms. Myer's title, if you know?

15 A Office administrator.

16 Q And was Ms. Myers an employee that was eligible to vote in
17 the election that culminated or that -- I'm sorry in the July
18 (sic) 8th, 2015 election?

19 A Yes.

20 Q July 8th, geez, Jeff, come on. In the May 8th, 2015
21 election?

22 A Yes.

23 Q And prior to the election, did you have any conversations
24 with Ms. Myers about her view on unionization?

25 A Yes.

1 Q How many conversations do you recall with Ms. Myers?

2 A Once.

3 Q Was it in person or over the phone if you recall?

4 A In her office.

5 Q Do you recall how close it was to the election?

6 A Maybe three or four days before it.

7 Q And what do you recall being said and by whom during that
8 conversation?

9 A She called me into her office and was giving me her
10 concerns about Durham.

11 Q Okay. And do you recall what, if any, response you had to
12 that?

13 A I told her to follow her heart, too.

14 Q Is it your testimony, ma'am, that -- well strike that.
15 Other than telling other staff members eligible to vote in the
16 May 8th, 2015 election to follow their hearts, can you recall
17 telling any other eligible voters anything else about your
18 thoughts on unionization?

19 A No.

20 Q Did you speak at either of the Union meetings?

21 A Yes.

22 Q Let's take the first Union meeting that occurred at
23 TOGO's. What did you say at that meeting that you recall?

24 A That everybody have to make up their own mind on what they
25 want to do.

1 Q Anything else?

2 A Not really, no.

3 Q Second meeting, did you speak at that? Second Union
4 meeting, I'm sorry, that occurred at Applebee's.

5 A Yes.

6 Q And do you recall what you said at that meeting?

7 A Same thing, that you need to make up your minds what you
8 want to do.

9 MR. GILBERT: At this point in time, I would renew my
10 motion to examine this witness as a 611(c). At a minimum the
11 witness has testified that she assisted the Union in passing
12 out authorization cards and collecting authorization cards on
13 behalf of the Employer -- on behalf of the Union and was
14 exchanging text messages with Mr. Smith setting up meetings on
15 behalf of the staff members that were eligible to vote and
16 communicating with the Union about the organizational efforts.

17 HEARING OFFICER KAUFMAN: And at this point my ruling is
18 still that I am not granting permission to proceed as a 611(c)
19 witness because the fact that she assisted the Union on its own
20 isn't enough to establish that you need to proceed under 611(c)
21 status.

22 MR. GILBERT: So a supervisor acting inconsistent with the
23 Employer's wishes does not demonstrate that the supervisor is
24 in fact then acting contrary -- I mean that doesn't show an
25 adverse interest in the Employer's best interest?

1 HEARING OFFICER KAUFMAN: We don't know that she's a
2 supervisor at this point. There's been --

3 MR. GILBERT: So you're going to tell me now that I have
4 to -- you're going to tell me how to try my case and then now
5 you're going to tell me that I have to adduce evidence that
6 satisfies somebody who is not making the ultimate decision
7 about supervisory status before that I can examine this witness
8 as an adverse witness? Is that the ruling?

9 HEARING OFFICER KAUFMAN: I'm saying that at this point,
10 you haven't demonstrated to me that it's necessary for you to
11 proceed with her under 611(c) status.

12 Q BY MR. GILBERT: What -- do you ever orally reprimand
13 drivers in your position as dispatcher?

14 A No.

15 Q Do you ever orally counsel drivers?

16 A No.

17 Q Do you ever give advice to drivers?

18 A Depends.

19 Q Depends on what?

20 A What the subject is.

21 Q How to do their job?

22 A No.

23 Q You ever use the term my drivers?

24 A No.

25 Q Have you ever said that you could run the facility without

1 Q -- January to the date of the election --

2 A Okay.

3 Q -- did you receive time off slips from employees?

4 A Yes.

5 Q And did you receive them on a daily basis?

6 A No.

7 Q On a weekly basis?

8 A Maybe.

9 Q Okay. Now so we're clear again, we're talking about this
10 January 2015 to May 8, 2015. When you received one of these
11 time off slips marked as Employer's Exhibit 3, what did you do
12 with it?

13 A If Sandra is there, I take it to Sandra. If Sandra is not
14 there, I tell the driver to put it in her box.

15 Q Ma'am, is it true that yesterday Mr. Mahler approached you
16 and advised you that we had compliance to comply with a federal
17 court subpoena and that we needed any copies of what's been
18 marked as Employer's Exhibit 3 in your possession?

19 A Yes.

20 Q And ma'am, is it true that yesterday when we came to you
21 and told you that, you provided us with a banker's box full of
22 Employer's Exhibit 3s?

23 A Yes.

24 Q And those were in your possession, correct?

25 A Yes.

1 HEARING OFFICER KAUFMAN: Thank you.

2 MR. GILBERT: Am I up to 4?

3 HEARING OFFICER KAUFMAN: Four.

4 (Employer Exhibit Number 4 Marked for Identification)

5 Q BY MR. GILBERT: And I've handed you what's been marked as
6 Employer's Exhibit 4 which I will represent for the record is
7 17-page document that contains requests for time off slips. Can
8 you review that document please, ma'am?

9 A What's the name on it? You said number 17?

10 Q No, it's 17 pages in total.

11 A Could you give me the name of the person on the slip?

12 Q No, I'm just asking you to look at the document.

13 A Which one are you referring to?

14 Q Just the document in general, ma'am.

15 A Okay.

16 MS. NISPEROS: Is Employer counsel asking the witness to
17 review the packet of --

18 MR. GILBERT: Yes, thank you.

19 MS. NISPEROS: -- papers?

20 MR. GILBERT: Thank you.

21 MS. NISPEROS: Thank you.

22 THE WITNESS: Okay.

23 Q BY MR. GILBERT: And ma'am, would you agree with me that
24 each one of these requests for time off slips tat's contained
25 within Employer's Exhibit 4 contains your signature?

1 A Yes.

2 Q And would you agree with me that at least for the leaves
3 that are represented within Employer's Exhibit 4, which I will
4 represent for the record are all in 2012, you granted time off
5 to these employees that are --

6 MS. NISPEROS: Objection. It's a leading question.
7 Assuming that she's granted time off.

8 Q BY MR. GILBERT: Okay. So what is the impact of your
9 signature on the documents, ma'am?

10 A At the time the GM Jimmy Perkins, he was the GM there, and
11 he refused to do these. He said that I'm the one that's
12 covering the routes, so I should be in charge of the time off
13 slips.

14 Q Right. And isn't it true that earlier today, you
15 testified under oath that in 2012, you granted time off to
16 employees?

17 A Yes, yes.

18 Q And so ma'am, all I'm asking is by putting your signature
19 on these documents, which are contained within ER-4, did you
20 grant time off to employees?

21 A With the okay from a GM, yes.

22 Q He gave you the authority to grant time off, correct?

23 A Yes.

24 MR. GILBERT: I move for the admission of Employer's
25 Exhibit 4.

1 HEARING OFFICER KAUFMAN: Petitioner, any objection to the
2 admission of Employer's Exhibit 4?

3 MS. NISPEROS: No objection.

4 HEARING OFFICER KAUFMAN: Employer Exhibit 4 is received
5 into the record.

6 (Employer Exhibit Number 4 Received into Evidence)

7 Q BY MR. GILBERT: And again, ma'am, your -- at some point
8 in time, is it your testimony that someone told you that you
9 couldn't sign what's been marked as Employer's Exhibit 3
10 anymore?

11 A Yes.

12 Q Do you recall the individual that told you that?

13 A I believe it was Diane, the GM, I think it was her. I'm
14 not for sure.

15 Q Do you recall Diane's last name?

16 A Hulsey, H-U-L-S-E-Y I believe.

17 Q All right. So now let's move back to the present here.
18 January of 2015 to May of 2015. Okay.

19 A Okay.

20 Q May 8th. You received one of these slips from an employee
21 marked as Employer's Exhibit 3 and is it your testimony that
22 you always then give it to -- if you take it, you give it to
23 Sandra?

24 A Yes, sir.

25 Q Without exception?

1 A An attendance point?

2 Q Yes, ma'am.

3 A That's up to Sandra.

4 Q Well, you would report her as being absent, correct?

5 A I would report her as calling off. If Sandra want to
6 count it as an absence, that's up to Sandra.

7 Q You would report her as calling off without permission,
8 right?

9 A Yes.

10 Q Okay. And do you do -- do you keep a list of who you tell
11 that -- do you keep a list every day of who's reported off
12 without permission?

13 A Yes.

14 Q Okay. Where do you keep those?

15 A In the -- I have a board sheet that I fill out. If a
16 driver call off in the midday or p.m., I put that on the board
17 sheet so dispatch can see it and Sandra or whoever come in
18 there and look at -- management look at the board sheet.

19 Q Okay. And so is it fair to say that, though, if someone
20 calls off and you grant them -- or someone -- whoever at the
21 company grants them time off, they wouldn't be on your sheet,
22 right?

23 A Not necessarily, no. They can call off over the phone.

24 Q Understood. But if someone doesn't -- you -- under the
25 attendance policy, if someone doesn't get permission for time

1 off --

2 A Okay.

3 Q -- it's an attendance occurrence, right?

4 A Yeah. If they don't get permission, yes.

5 Q Right. And so on your sheet that you're talking about,

6 who is listed on that sheet? Only people that didn't get

7 permission for time off?

8 A No. If they got permission, they're on that sheet. If

9 they didn't get permission, they called off, they're on that

10 sheet.

11 Q Okay. So let me -- so let's move -- let's keep -- move

12 forward then.

13 A Okay.

14 Q Do you keep -- when you tell Ms. Wilson on a daily basis

15 who called off without permission, without time granted off, do

16 you do it verbally or through -- in writing?

17 A Verbally. If they're calling off, verbally. And then I

18 would put it on my board sheet. And Eliza would put it in her

19 book.

20 Q All right. Let me ask you it this way. This is -- maybe

21 this is a better way. Is there any document that you know of

22 that exists that only contains the names of those individuals

23 that should receive attendance occurrences on a daily basis?

24 A All I know of is the book that Eliza keep. What Sandra

25 keeps, I don't know.

1 if they keep them.

2 Q Okay. So they can ask you or Sandra?

3 A Yes.

4 MR. GILBERT: Okay. I would move for the admission of
5 Employer's Exhibit 7.

6 MS. NISPEROS: No objection.

7 HEARING OFFICER KAUFMAN: Employer's 7 is received into
8 the record.

9 (Employer Exhibit Number 7 Received into Evidence)

10 (Counsel confer)

11 Q BY MR. GILBERT: Ms. Dorton, I've handed you what's been
12 marked as Employer's Exhibit 8. And I would ask that you
13 review that picture and, if you can, identify it for the
14 record.

15 MR. GILBERT: And I will represent, just to be clear, that
16 all the pictures were taken again yesterday at approximately
17 1:30 by Sandra.

18 THE WITNESS: I'm looking at the dispatch fleet board and
19 route board.

20 Q BY MR. GILBERT: Okay. And ma'am, what is the fleet
21 board, if you can just describe for the record?

22 A It shows the route number, the driver's name, and the bus
23 they're driving?

24 Q So if you look at this board, on the left-hand side I
25 believe it starts with the number 100 and it goes down to 133.

1 Do you see that?

2 A Yes.

3 Q So does the 100, 101, 102, et cetera, that -- those
4 numbers, what do they represent?

5 A The route numbers.

6 Q Okay. And then in the blue with the exception of the
7 first entry and then there's in the second -- or the last and
8 the second to last and then number 126 is red, what do the blue
9 in the second column represent?

10 A The driver's name.

11 Q And then the third column appears to be predominantly
12 yellow, although there's some blanks. What does the third
13 column represent?

14 A The bus they're driving.

15 Q Do dispatchers, and particularly you as a dispatcher, use
16 this board?

17 A Yes.

18 Q Can you describe how you would use this board?

19 A To identify a driver and what route they're on.

20 Q Okay. Other than to identify a driver and the route
21 they're on, do you use this board to fill in for routes or to
22 indicate if a driver is substituting for another driver?

23 A Yes.

24 Q So we had talked about how when someone does receive time
25 off permission you have to find a substitute, correct?

1 the mechanic, he'll come in and get a bus from us to take to
2 the breakdown.

3 Q And who assigns that bus to -- that spare bus to that
4 driver?

5 A Whoever is in dispatch.

6 Q Okay. So it can be a number of people?

7 A Whoever is in dispatch, yes.

8 Q Okay. So just so the record is clear, I know you've
9 identified yourself and Adela as dispatchers?

10 A Yes.

11 Q Now you're saying other people are in dispatch. Can you --

12 A Eliza, Elise.

13 Q Just let me finish the question. I'm not trying to be
14 rude. I'm really not.

15 A Okay.

16 Q Because we talked about different time periods.

17 A Okay.

18 Q So I want to focus on January to May. Who else was in
19 dispatch between January and May of 2015?

20 A We had Paula. She's a driver. She was on workman comp.

21 I can't remember everybody that's in there. But everybody
22 don't pass out busses.

23 Q Ma'am, and that's not my question. I'm just trying to
24 make sure the record is --

25 A I can't remember. I can't recall everybody that's been in

1 there since January.

2 Q Understood. What I'm asking is can you tell me who you
3 can recall?

4 A Paula, Elise --

5 HEARING OFFICER KAUFMAN: And last names and spellings if
6 you can, please.

7 THE WITNESS: Paula -- I don't know Paula's last name.
8 Elise Lewis. I can't think of who else right now.

9 Q BY MR. GILBERT: Did you say Eliza?

10 A Eliza is in there.

11 Q Okay. And then was there a woman named Deb?

12 A Oh. Becka, she was in there.

13 Q And how about a Debbie, Deborah (phonetic throughout)?

14 A She wasn't in there. She's a cover driver. She's in and
15 out all the time.

16 Q Did Deborah have a wrist injury?

17 A That wasn't -- I know Paula did.

18 Q Okay. So, all right. Anybody else? Have you given me
19 everybody's name?

20 A I can't recall right now.

21 Q Okay. And when those individuals -- so is it fair to say
22 that individuals that are on light duty or have restrictions
23 that prevent from driving a bus are sometimes assigned to
24 assist you in dispatch?

25 A Yes.

1 Q When those individuals are assigned to assist you in
2 dispatch, who is their immediate supervisor?

3 A Sandra.

4 Q Okay. Do you give them any instructions on what to do,
5 those people that are then again assigned on a -- you know,
6 because of light duty assigned to dispatch, do you ever give
7 them assignment or direct their work?

8 A I may ask them to call parents, something that
9 naturally --

10 Q Okay. Other than asking them to call parents, though, do
11 you direct their work on a daily basis?

12 A No.

13 MS. NISPEROS: Objection. It's leading.

14 HEARING OFFICER KAUFMAN: Can you --

15 MR. GILBERT: I don't --

16 HEARING OFFICER KAUFMAN: -- rephrase the question?

17 MR. GILBERT: Well, and I'm not --

18 HEARING OFFICER KAUFMAN: Ask some more specific
19 questions, please.

20 MR. GILBERT: Your Honor, I'm not trying to be difficult.
21 But do you direct their work on a daily basis isn't leading.

22 It's a yes or no. And she answered no. So I don't know --

23 HEARING OFFICER KAUFMAN: Well, maybe you could try asking
24 her a more -- some more detail --

25 MS. NISPEROS: I'll withdraw the objection. It's fine.

1 minutes, so is three minutes the standard when you go to a --

2 A Three minutes when you go to pick up a kid in the morning.

3 I'm usually -- I'm not there in the morning, so when you go to
4 a house in the morning, you wait for three minutes, but I'm not
5 a morning dispatcher, so I'm not involved with that part.

6 Q Okay. If I can finish, and I appreciate --

7 A Okay.

8 Q It's okay, but thank you. So let's say take somebody --

9 A Okay.

10 Q -- home and there's nobody there.

11 A Uh-huh.

12 Q -- do the drivers call you then?

13 A Yes.

14 Q What's your standard operating procedure in that instance?

15 A We have to do two drive by to their homes before, then
16 I'll call the district. We have to go twice, and then I'll
17 call the district. And if the district tell us to either bring
18 the kid there or they try to locate a parent.

19 Q Do you ever try to locate the parent?

20 A Yes.

21 Q And do you ever talk and work with the district on what
22 the best course of action is to take with the child?

23 A Yes.

24 Q And what factors do you and the district look at when
25 you're determining what the bus driver should do?

1 A How long the kid been on the bus and have this happened
2 before, things like that.

3 Q What about the child themselves? The conditions -- and
4 I'm not trying to get personal into a particular child, but
5 your testimony was that we're transporting children with
6 disabilities, correct?

7 A Correct.

8 Q Some children, I would assume, have more severe
9 disabilities than others.

10 A Yes.

11 Q And do you, as a dispatcher, have knowledge of which
12 children have which disabilities?

13 A No, not all, no. Some.

14 Q Some?

15 A Yes.

16 Q And is that something you would consider when determining
17 the course of action to take for a driver when a parent isn't
18 home when they're trying to drop a child off?

19 A Not really, because if we're stuck with a kid, we're just
20 stuck with a kid.

21 Q What other factors do you and the district consider when
22 you're determining what a driver should do if a parent isn't
23 home?

24 A That's the only two things that we do. We either keep the
25 kid on the bus until the district locates someone or the

1 district accept the kid.

2 Q Have you ever had a driver that says, "I have to leave my
3 route, I can't continue to drive around with this child in the
4 bus because I have a commitment?"

5 A Yes, we have -- yes.

6 Q What do you do in those instances?

7 A That doesn't happen often.

8 Q What do you do in those instances?

9 A We have had a driver to bring the child to the yard
10 before.

11 Q Okay. Have you ever made a decision to send a bus driver
12 out to meet the bus?

13 A Yes.

14 Q Okay. How do you, ma'am -- what factors do you look at
15 when you're determining how to handle these different
16 situations?

17 A I call it out over the radio. Is there a driver, another
18 driver available to meet this driver to take this kid off the
19 bus? That's it.

20 Q And if there's no volunteers, then what?

21 A It becomes a district problem or we'll call the district
22 and say -- or take them to the police department. And we try
23 not to do that.

24 Q And whose decision is it to take them to the police
25 department.

1 A It would be the district's.

2 Q Can you, as a dispatcher, decide to take somebody to the
3 police department?

4 A No.

5 Q The bus routes, how are they assigned at the beginning of
6 the year, if you know?

7 A They bid, drivers bid on the routes.

8 Q If you know, under the collective bargaining agreement, do
9 you have the ability to move a driver off of a route?

10 A No. Wait, I -- what do you mean by move a driver off the
11 route? Permanently?

12 Q No, it was a bad question. I apologize. Thank you for
13 clarifying it. I'm talking about on a temporary basis.

14 A Yes, on a temporary base, yeah.

15 Q And does the dispatch make that decision whether or not to
16 remove a driver from a route or to switch a driver from one
17 route to the other?

18 A When it comes to me covering routes, yes, I ask the driver
19 would they mind driving another route. I just don't take that
20 driver off.

21 Q And again, I think you've already testified to this, but I
22 just want to make sure it's clear, in the instances where you
23 can't find a volunteer, it's your testimony that you always go
24 to Sandra to make the final decision as to what to do, is that
25 true?

1 too, but the record will speak for itself --

2 MR. GILBERT: Fine.

3 HEARING OFFICER KAUFMAN: -- and if you want to phrase
4 the question a different way.

5 MR. GILBERT: Okay.

6 Q BY MR. GILBERT: In 2012 when you signed the forms, what
7 factors did you consider when you were deciding whether to sign
8 the form?

9 A It really wasn't any factors to consider. They wanted the
10 time off and I just signed them.

11 Q So it's your testimony as a dispatcher, you're already
12 short drivers, right?

13 A Uh-huh.

14 Q Yes?

15 A Yes.

16 Q And someone comes in and says, hey, I'd like to go golfing
17 today. You just granted the time off, and that didn't look at
18 the reason why?

19 A They would tell us the reason -- tell me the reason why,
20 but they're going to take it anyway.

21 Q But if you grant the time off, it's not an absence --

22 A No, it's not.

23 Q -- under the attendance policy, correct?

24 A No, it's approved.

25 Q All right. So is it your testimony that regardless of the

1 reason, you just granted the time off?

2 A No.

3 Q So you did consider the reason?

4 A Yes.

5 Q Okay. Did you consider the number of drivers that were
6 out?

7 A Yes.

8 Q Did you consider the type of route that the driver was
9 driving that wanted the time off?

10 A Yes.

11 Q So for example, if it was a wheelchair route, is it harder
12 to find drivers that are capable of -- who know the proper
13 protocol, as far as strapping down wheelchairs and how to
14 handle wheelchairs?

15 A Yes, it's very hard.

16 Q So if a wheelchair driver wanted time off, again, this is
17 when you were signing those forms, you would consider the
18 difficulty in replacing that individual in determining whether
19 to grant the time off, correct?

20 A Yes.

21 Q Any other factors that you would consider?

22 A No, not really.

23 Q How about the availability of other drivers to do the
24 route?

25 A Can I elaborate on that? I mean --

1 Services?

2 A Off and on about 30 years.

3 Q Thirty years, all right. Where are you currently
4 employed, what location?

5 A Hayward.

6 Q And is that, for the record, Hayward Customer Service
7 Center, or CSC?

8 A Yes.

9 Q And what's your current job title?

10 A Operations Supervisor.

11 Q Prior to being operations supervisor in Hayward, were you
12 employed for Durham Oakland?

13 A I was employed at Durham in Oakland, Peterman Northwest
14 also.

15 Q Okay.

16 A Yes.

17 Q And is Peterman a company that Durham purchased?

18 A Yes.

19 Q Okay. How long have you been the operations supervisor at
20 Durham's Customer Service Center in Hayward, California?

21 A About nine months, since August of 2014.

22 Q Are you familiar with the National Express employee
23 handbook?

24 A Yes, pretty much.

25 Q And what's National Express, just for the record?

1 contained within Employer's Exhibit 23?

2 A The employee's name.

3 Q No. But what are they?

4 A Oh, it is a counseling --

5 Q So --

6 A -- form --

7 Q -- the eight --

8 A -- corrective action.

9 Q The eight pages in Employer's Exhibit 23 are -- is each
10 individual page a corrective action relating to attendance
11 violations?

12 A Yes.

13 Q Who completed these ma'am?

14 A I did.

15 Q Ma'am, are these documents kept in the employee's
16 personnel file?

17 A Yes. Yes, they are.

18 Q And are these documents kept in the ordinary course of
19 business at the Employer's facility?

20 A Yes.

21 Q And do you have access to these documents?

22 A Yes, I do.

23 Q And attendance infractions, ma'am, result in termination
24 of employment?

25 A I didn't understand.

1 Q Sure. Can intendance, attendance -- geez -- occurrences
2 result in the termination of an employee's --

3 A Yes, it could.

4 Q -- employment?

5 A Yes.

6 Q So if an employee submits requests for time off forms that
7 aren't granted on a number of occasions could that lead to an
8 employee -- if they -- employee still takes that time off could
9 that lead to the employee's termination?

10 A Yes.

11 MS. NISPEROS: Objection. Assumes facts not in evidence.

12 HEARING OFFICER KAUFMAN: Mr. Gilbert, do you want to just
13 get a little bit of information about where the policy's
14 contained?

15 MR. GILBERT: Policy was in an exhibit that's been
16 introduced in the employee --

17 Q BY MR. GILBERT: So, ma'am, is the policy contained in the
18 employees' handbook?

19 A Yes, it is?

20 MR. GILBERT: So I'm -- am I still addressing this
21 objection or I just -- I guess I don't -- the objection was
22 facts not in evidence. I'm asking this individual based on her
23 knowledge of the handbook, the policies whether or not
24 something could lead to termination. I don't understand how
25 that --

1 Wilson as her supervisor what her job duties are, that is Ms.
2 Dorton, things of that nature. So it would be a good time to
3 if we're going to take a lunch probably right right now.

4 HEARING OFFICER KAUFMAN: About how much more time do you
5 think you'd have?

6 MR. GILBERT: I would think about 45 minutes.

7 HEARING OFFICER KAUFMAN: About 45 minutes?

8 MR. GILBERT: Uh-huh.

9 HEARING OFFICER KAUFMAN: We could keep going and then
10 break for lunch before cross-exam. How do you feel about that?

11 MS. NISPEROS: I would prefer to keep going since we got a
12 late start.

13 MR. GILBERT: I'm not being difficult but Adina will -- I
14 have a hiatal hernia. Okay. And so if I don't eat it -- it's
15 bad news. And I'm not --

16 HEARING OFFICER KAUFMAN: Fair enough.

17 MR. GILBERT: Okay.

18 HEARING OFFICER KAUFMAN: Okay. Fair enough. We can go
19 ahead and take our lunch break at this point. Let's go ahead
20 and go off the record.

21 (Off the record at 12:17 p.m.)

22 HEARING OFFICER KAUFMAN: Okay. Ms. Wilson, you're still
23 under oath.

24 Q BY MR. GILBERT: Ms. Wilson, and I may have asked you
25 this. What time do you -- what time are your hours?

1 A 5:45 to 4.

2 Q And what are to your knowledge Mr. Maller's hours?

3 A He's normally there before I get there so I would say
4 maybe five and he's normally there till about five.

5 Q And what's Eileen's last name, ma'am?

6 A Noonan, N-O-O-N-A-N.

7 Q And just for the record what's Ms. Noonan's title?

8 A Safety and training supervisor.

9 Q And Eileen is what time? At what time are her hours
10 generally?

11 A She normally gets there about I would say seven and she's
12 there until about four.

13 Q We've had some testimony about Jeremy.

14 A Jeremy.

15 Q What are Jeremy's hours?

16 A I really couldn't say because he's in the maintenance
17 department. But I know he's there at least by six and he's
18 still there till about I would say 4:00 I will see him.

19 Q Okay. And, ma'am, what are Michelle's hours?

20 A 10:30 till 7.

21 Q Ma'am, if Ms. Dorton is not a supervisor would there be
22 any representative of management at the facility on a daily
23 basis between 5 p.m. and 7 p.m.?

24 A No.

25 MS. NISPEROS: Objection. Calls for speculation.

1 HEARING OFFICER KAUFMAN: Maybe you could just rephrase.

2 If Ms. Dorton is not at the facility or when Ms. Dorton is not
3 at the facility is there any member of management. Maybe you
4 could just rephrase the question for her.

5 MR. GILBERT: Well I'm not trying to be difficult. I
6 really don't want to be difficult but I don't -- the objection
7 was speculation. I mean I said if she is not -- if it's
8 determined she's not a supervisor -- okay. I'll rephrase it.

9 MS. NISPEROS: Calls for a conclusion.

10 Q BY MR. GILBERT: I want you to assume that Ms. Dorton is
11 not a supervisor. Okay.

12 A Okay.

13 Q Are there any supervisors, any representative of
14 management at the facility between 5 and 7 p.m. at night?

15 A No.

16 Q Is Ms. Dorton -- well let me -- do you know the hours of
17 the routers?

18 A Yes.

19 Q Okay. And can you identify the routers for the record?

20 A Sherry Head, H-E-A-D and Candy Comancho.

21 Q And what are their hours if you -- to your knowledge?

22 A Sherry is there from 7 till about 5 and Candy is there
23 from 10:30 to 7.

24 Q And what are -- who is the payroll clerk?

25 A Darlene.

1 Q And is that her right title? I don't want to disparage
2 her in any way. What's the --

3 A Payroll.

4 Q -- title? Payroll?

5 A Yes.

6 Q Okay. And what's Darlene's -- Corley you said?

7 A Corley?

8 Q What are Darlene's hours?

9 A Seven to five.

10 Q And who is the accounts receivable clerk, person?

11 A The administrative assistant, Shirley.

12 Q What's Shirley's last name?

13 A I'm trying to remember.

14 Q Is it Myers?

15 A Myers, that's right. Correct.

16 Q M-Y-E-R-S?

17 A Yes.

18 Q Do you know Ms. Myers' hours?

19 A She comes in at 8:30 and she leaves at 5.

20 Q And Adela Garcia, who is Adela Garcia?

21 A She's the other dispatcher.

22 Q What are her hours of work?

23 A 5:30 to 2:30.

24 Q 5:30 a.m.?

25 A Yes.

1 Q I'm drawing a blank. Sherry Head, Candy Comancho, Darlene
2 Corley, Shirley Myers -- oh, I'm sorry -- Adela Garcia and
3 Michelle Dorton, they -- were they the individuals at the
4 customer service center that had the opportunity to vote in the
5 May 8th, 2015 election from the Hayward Service Center?

6 A Yes.

7 Q Okay. Is there an individual -- and this is just again to
8 set some background because we haven't done this yet. Is there
9 a satellite office associated with the Hayward Customer Service
10 Center?

11 A Yes, there is.

12 Q What's that called?

13 A Livermore.

14 Q And is it the Livermore Customer Service Center?

15 A Yes, it is.

16 Q Who is the supervisor in charge of the Livermore Customer
17 Service Center?

18 A Roxanne.

19 Q And do you recall is Roxanne's last name Liete?

20 A Liete, L-I-E-T-E.

21 Q L-E-I-T-E (sic)?

22 A Yeah.

23 Q And was there -- was anybody from the Livermore Customer
24 Service Center eligible to vote in the May 8th, 2015 election?

25 A Yes.

1 Q Who?

2 A Susan and I'm not sure of her last name.

3 Q Do you know Susan's title?

4 A I really don't know.

5 HEARING OFFICER KAUFMAN: Do you know Roxanne's title?

6 THE WITNESS: She's the operations supervisor.

7 Q BY MR. GILBERT: And from your testimony it's fair to say
8 that neither you, Ron, Eileen or Eileen are at the facility on
9 a regular basis past 5 p.m. Is that true?

10 A True.

11 Q Between five and seven are drivers out on the road?

12 A Yes.

13 Q Do issues at the -- you know with drivers in the facility
14 come up between five and seven?

15 A It could.

16 Q Do we receive phone calls from parents between five and
17 seven?

18 A Yes, we could.

19 Q Do decisions have to be made how to cover routes between
20 five and --

21 MS. NISPEROS: Objection.

22 MR. GILBERT: -- seven?

23 MS. NISPEROS: Asks for a legal conclusion.

24 THE WITNESS: Yes.

25 MR. GILBERT: Legal conclusion.

247

1 HEARING OFFICER KAUFMAN: What's your response?

2 MR. GILBERT: I honestly don't have a response as to how
3 do we have to cover routes between five and seven is a legal
4 question.

5 HEARING OFFICER KAUFMAN: I think the objection was to the
6 question do decisions have to be made between five and seven.

7 MS. NISPEROS: Correct.

8 MR. GILBERT: Decisions is not a legal. It's not -- we're
9 not applying any legal standard to a decision.

10 HEARING OFFICER KAUFMAN: Ms. Nisperos.

11 MS. NISPEROS: If this testimony is getting to anything
12 related to what Michelle Dorton does during that timeframe then
13 the implication is that she's making decisions which is a legal
14 conclusion.

15 MR. GILBERT: I would disagree that if the implication
16 that Ms. Dorton has to make decisions that making a decision is
17 not a legal conclusion.

18 MS. NISPEROS: And it's --

19 MR. GILBERT: The types of --

20 MS. NISPEROS: -- it's also leading.

21 MR. GILBERT: -- decisions --

22 MS. NISPEROS: It's leading.

23 MR. GILBERT: -- may be a legal conclusion but the
24 decision, making a decision itself it probably -- that's my
25 position.

1 HEARING OFFICER KAUFMAN: Okay. I'm going to allow the
2 question and I'm going to accord it the appropriate weight when
3 I'm drafting the decision. But we'll see where this goes.

4 Q BY MR. GILBERT: Are there drivers on the road between
5 five and seven?

6 A Yes.

7 Q And are there occasions when those drivers on the road
8 between five and seven need guidance?

9 A Yes, I wouldn't say they're delivering children after that
10 hour. They may be on the road on their way home or something
11 like that but --

12 Q And --

13 A -- not necessarily.

14 Q -- accidents could happen at that time?

15 A Accidents could happen.

16 Q And Michelle Dorton would be the individual that they
17 contact for that?

18 A Yes.

19 Q The bus could break down, correct?

20 A Yes.

21 Q Michelle Dorton would be the individual they'd have to
22 contact for that?

23 MS. NISPEROS: Objection. Leading.

24 THE WITNESS: Yes.

25 MR. GILBERT: Okay. I will rephrase.

1 Q BY MR. GILBERT: Who would the individual have to contact
2 if the bus broke down between five and seven?

3 A Michelle Dorton.

4 Q I believe that you testified that at least Candy Comancho
5 or Kamato would be at work on the staff between five and seven?

6 A Yes.

7 Q Ma'am, do you -- from your office where you are in your
8 office can you overhear what happens in dispatch?

9 A Yes, I can.

10 Q How far would you estimate your office is from dispatch?

11 A To the actual area or to the door --

12 Q Well --

13 A -- the entrance into dispatch?

14 Q -- well okay. Let's -- how about. All right. Let's just
15 put -- how far would you estimate your desk is from Michelle
16 Dorton's desk?

17 A Oh, from here to the other side of the wall on the outside
18 of it.

19 Q The outside of that wall?

20 A Yes.

21 Q Okay. And I would just represent that that's about
22 approximately 30 to 40 feet?

23 A Yes.

24 Q Okay. Well -- okay. That's fine. And, ma'am, have you
25 ever heard or do you have knowledge that Ms. Dorton has ever

1 required a driver to perform a route? Strike that. Have you
2 ever heard Ms. -- do you have any knowledge of Ms. Dorton ever
3 requiring a driver to cover a route?

4 A Yes.

5 Q And can you give me, describe for the record the instance
6 that you're referring to?

7 A Where a driver has to double up on his kids and another
8 driver's students so that that other driver could cover another
9 route and he's insisting that he don't want to do it because of
10 the conflict with the children and the ride time and the
11 parents. And he's been told that he had to do it.

12 Q By who?

13 A By Michelle.

14 Q And who was the driver?

15 A Mark Hobson.

16 Q And who is the other individual that he would be covering
17 for?

18 A Donna Jackson.

19 Q And when Mr. Hobson was told by Michelle that he had to do
20 the route did he do the route?

21 A He did it.

22 Q How often, ma'am, do you get involved in covering routes?

23 A Not too often.

24 Q Would you estimate that it happens on a daily basis,
25 weekly basis or can you give us an estimate?

1 A Maybe weekly.

2 Q And on a daily basis based on your experience, 20 some odd
3 years in the industry and your experience at the facility, how
4 often on a daily basis are dispatchers required to cover
5 routes?

6 A Daily.

7 Q How many times a day?

8 A Oh, five, six times a day minimal.

9 Q And it's your testimony that you might be involved once a
10 week?

11 A I could be, yes.

12 Q Ma'am, have you ever heard Ms. Dorton counsel employees?

13 MS. NISPEROS: Objection. Calls for a conclusion.

14 HEARING OFFICER KAUFMAN: I haven't even heard his full
15 question yet.

16 MS. NISPEROS: Okay. I thought it was counsel employees.

17 HEARING OFFICER KAUFMAN: Can you state your question?

18 Q BY MR. GILBERT: Have you ever heard Ms. Dorton counsel
19 any employees in dispatch?

20 A Yes, I have.

21 Q Who?

22 A Her name is Becca and Paula.

23 Q So those are two separate employees?

24 A Two separate people.

25 Q And we've had some testimony again foundationalized about

1 employees that actually assist in dispatch?

2 A Yes.

3 Q Are -- is Becca an employee that assisted in dispatch?

4 A Yes, she did.

5 Q Is Paula an employee that assisted in dispatch?

6 A Yes.

7 Q Why does the Employer have drivers that assist in
8 dispatch?

9 A Well one is a driver. One was a temp person. Paula was a
10 driver. She was on modified duty because she was injured on
11 the job.

12 Q And so what did -- what kind of counseling did you hear
13 Ms. Dorton give Becca?

14 A Say she answered the phone, she felt like she didn't do
15 the job correctly and she counseled her into how she should've
16 done it.

17 Q Anything else that you can recall as far as Ms. Dorton
18 counseling employees in dispatch?

19 A How they handle phone calls or how they handle other
20 drivers or things like that.

21 Q Do we ever have that is the customer service ever --
22 customer service center ever have to work with parents that are
23 angry about an issue involving the bus service?

24 A Yes.

25 Q And how often does that occur?

1 A Oh, that could be daily.

2 Q And does Adela Garcia take those calls?

3 A Sometime, yes.

4 Q And when Adela Garcia takes those calls does she consult
5 with anybody to help her handle the parents?

6 A Yes.

7 Q Who?

8 A Me.

9 Q Does Michelle Dorton take those calls?

10 A Yes.

11 Q How often if at all does Michelle Dorton consult with you
12 on dealing with parents?

13 A Very little.

14 Q Ma'am, can you refer to Exhibit 22. I think it's up there
15 in front of you. It has not been moved for admission but it
16 has been handed to the witness. I'll represent for the record
17 it is the time off slip request from Maria Lopez. Ma'am, in
18 your capacity as operations supervisor are you familiar with
19 Michelle Dorton's signature?

20 A Yes.

21 Q And is that Michelle Dorton's signature that is on the
22 front of Employer's Exhibit 22?

23 A Yes.

24 Q I'm going to hand you what's been marked as Employer's
25 Exhibit 24. I'll represent for the record it's a time off or a

1 Q And you talked about, earlier you talked about two
2 employees who do work in dispatch office, you mentioned the
3 names of Becca and Paula; do you recall that?

4 A Yes.

5 Q Do you set Becca and Paula's work schedules?

6 A Yes.

7 Q You do? Do you grant their requests for time off?

8 A Yes.

9 Q Okay. Do you assign them work tasks?

10 A Yes.

11 Q Okay. Do you have the authority to discipline them in
12 some way, whether that's -- well, I'll rephrase my question.

13 Do you have the authority to discipline Becca and Paula?

14 A Yes, I do.

15 Q Were you involved in the hiring of Becca or Paula?

16 A No.

17 Q Okay. To your knowledge, Michelle Dorton did not hire
18 them; is that fair to say?

19 A That's fair to say.

20 Q And isn't it fair to say that you are able to give
21 recommendations about whether they should be fired or
22 reprimanded in some way?

23 A Yes.

24 Q Do you have the authority to fire Becca or Paula?

25 A No.

1 Q And isn't it fair to say that if you exercise your
2 authority to recommend that Becca or Paula be fired, you would
3 do that to someone in upper management?

4 A Yes, I would.

5 Q You would not do that to Michelle Dorton?

6 A No.

7 Q Okay. And who would you make that recommendation to?

8 A Ron Mahler.

9 Q Is Ron Mahler the person who hired Becca and Paula?

10 MR. GILBERT: Objection, foundation, to the extent it
11 calls for speculation.

12 MS. NISPEROS: Okay.

13 Q BY MS. NISPEROS: Are you aware of whether Ron Mahler has
14 ever hired a Durham employee?

15 A Yes.

16 Q And has he ever hired a Durham employee?

17 A Yes, he has.

18 Q Do you know, if you know, can you tell me, did Ron Mahler
19 hire Becca?

20 A Yes, I would say so, yes.

21 Q Did he hire Paula?

22 A No, Paula was already there before he came.

23 Q Okay. Who hired Paula?

24 A I'm not sure. I wasn't there.

25 Q Okay. And isn't it true that, let's assume for the sake

1 of illustration that Michelle Dorton can ask Becca or Paula to
2 answer phones. Do you have the authority to override what
3 Michelle has told them?

4 A Yes.

5 Q Okay. And have you done that, in fact?

6 A No.

7 Q But you do have the authority to --

8 A I have -- yes I have --

9 Q -- override her?

10 A -- the authority.

11 Q And you have the authority to direct their work?

12 A Yes.

13 Q Give them assignments?

14 A Yes.

15 Q Okay. Thank you. And isn't it true that if Becca or
16 Paula -- isn't it true that you have the authority to transfer
17 Becca --

18 A Yes.

19 Q -- to another work assignment? Okay. And isn't it true
20 that you have the authority to transfer Paula to another work
21 assignment as well?

22 A Yes.

23 MR. GILBERT: We will stipulate that Ms. Wilson is a
24 supervisor as defined under Section 211 of the Act, if that
25 would expedite things.

1 HEARING OFFICER KAUFMAN: Ms. Nisperos is indicating that
2 that would not expedite things. I don't think that's what
3 she's trying to get at with this line of questioning.

4 Q BY MS. NISPEROS: And isn't it true -- so you gave some
5 testimony earlier about Becca answering phones. You said that
6 she answers phones in dispatch; is that accurate?

7 A Yes.

8 Q And you have the authority to counsel her about how to do
9 that; isn't that fair to say?

10 A Yes.

11 Q And you do, in fact, do that, isn't that right?

12 A I do.

13 Q Okay. And how many times do you do that a week?

14 A It's not a weekly thing. It's when it's the appropriate
15 time.

16 Q An appropriate time?

17 A Yes.

18 Q Can you elaborate?

19 A If I overhear a conversation that I think is inappropriate
20 for her to use or to do with any caller, then I intervene.

21 Q And you have done that while Michelle Dorton is present in
22 the office, isn't that right?

23 A I can't say whether she was there or not.

24 Q But you have the authority to do that if she was making an
25 inappropriate -- doing something inappropriate in regard to

1 these calls, we're talking about Becca, and Michelle Dorton was
2 present, you would do that, is that fair to say?

3 A Yes, I would.

4 Q Okay. And you don't wait on Michelle, you don't go to --

5 A No.

6 Q -- her in order to do that? Okay.

7 A No.

8 MR. GILBERT: We'd be willing to stipulate, if this is the
9 issue, that Ms. Wilson on the hierarchy chain is certainly Ms.
10 Dorton's supervisor, if that would help.

11 MS. NISPEROS: That's fine, but I want to continue my
12 questioning.

13 MR. GILBERT: Okay.

14 Q BY MS. NISPEROS: And isn't it the case that if Michelle
15 Dorton, I think we've already covered this but I want to make
16 it clear for the record, if Michelle Dorton gave a counseling
17 to Paula, you have the authority to override that; is that
18 right?

19 A Yes.

20 Q Okay. And you have done that, isn't that right?

21 A No, I don't remember doing that. No.

22 Q You testified earlier that it's your understanding that
23 Michelle Dorton communicates with the drivers between I believe
24 it was 5:00 and 7:00 p.m. Do you recall testifying to that?

25 A Yes.

1 Q Okay. And I believe the examples that you gave were
2 breakdowns, that was the example that the Employer counsel used
3 in that question. Do you recall --

4 A Yes.

5 Q -- talking about that? Isn't it true that there are
6 Durham policies that govern a situation where there is a
7 breakdown?

8 A Yes, there is.

9 Q Can you tell me about those policies?

10 A If there's a breakdown on the road, the driver calls in
11 either by phone or by radio to the dispatcher. She finds out
12 what's going on. She refer them to or she passes them on to
13 the maintenance department.

14 Q Isn't it true that Michelle Dorton is not authorized to
15 give mechanical advice about repairs to drivers?

16 A Yes.

17 Q And isn't it true that -- well, I'll rephrase my question.
18 What other Employer Durham policies govern a situation where a
19 driver has a breakdown?

20 A That is the procedure.

21 Q That they call dispatch --

22 A They call dispatch, yes.

23 Q And Michelle --

24 A And from dispatch it goes through to the maintenance
25 department.

1 Q Maintenance department? Can you describe -- let me
2 rephrase. Can you describe for me the maintenance department
3 process. So after the calls -- Michelle refers the call over
4 to maintenance, what happens?

5 A If it's the maintenance supervisor or one of the
6 mechanics, they will speak to the driver. They also have a
7 handheld radio they can talk to the driver, find out what's
8 going on and if they have to take a bus out or whatever, they
9 come back to dispatch and dispatch know what they're going to
10 be doing, whether they have to take a bus out or what needs to
11 happen.

12 Q Okay. And isn't it fair to say that the maintenance
13 folks, including the maintenance supervisor, give advice to the
14 drivers?

15 A Yes.

16 Q Okay. And what kind of advice do they give them?

17 A It's kind of hard for me to say because I don't work back
18 there.

19 Q Okay. Do you have any knowledge of what kind of advice
20 they give?

21 A Maybe how to start a bus if it dies on them.

22 Q Okay. And isn't it true that Michelle Dorton is not
23 authorized to tell drivers how to start a bus that has died on
24 them?

25 A She's not authorized, no.

1 Q Okay. She doesn't do anything, handle any mechanical
2 issues with buses as a part of her job's duties, does she?

3 A No.

4 Q Okay.

5 MS. NISPEROS: No further questions. Thank you, Ms.
6 Wilson.

7 HEARING OFFICER KAUFMAN: Okay. Thank you. Ms. Wilson,
8 thank you very much for your testimony --

9 MR. GILBERT: Well, I have two, three -- sorry, there's
10 redirect. I apologize.

11 MR. GILBERT: It's okay.

12 REDIRECT EXAMINATION

13 Q BY MR. GILBERT: Ms. Wilson, can Ron, can he grant time
14 off to Becca and Paula?

15 A Yes, he could.

16 Q And Michelle Dorton, can she grant time off to Becca and
17 Paula?

18 A Yes.

19 Q And can Michelle -- can Ron assign work tasks to Becca and
20 Paula?

21 A Yes.

22 Q Can Michelle assign work tasks to Becca and Paula?

23 A Yes.

24 Q And in fact, does Michelle actually assign work tasks to
25 Becca and Paula?

1 A Yes.

2 Q She do that on a daily basis?

3 A She has.

4 Q When a bus break down, are there some decisions that need
5 to be made before you talk to maintenance?

6 A Yes, when -- yes.

7 Q For example, well, let me ask you this. Does the
8 dispatcher have to determine whether or not the bus should stay
9 still or move to the side?

10 A Yes.

11 Q And if there's kids on the bus, does maintenance make the
12 decision what to do with the kids?

13 A No.

14 Q Who makes that decision?

15 A Dispatch.

16 Q You were asked a number of questions about the request for
17 time off slips when I was questioning you before, correct?

18 A Yes.

19 Q And you testified as to your position with respect to
20 which ones of those requests for time off forms were approved,
21 correct?

22 A Yes.

23 Q And you gave us the basis for why you believed that
24 certain request for time off forms were approved, correct?

25 A Yes.

1 THE WITNESS: Thank you.

2 HEARING OFFICER KAUFMAN: Off the record.

3 (Off the record at 2:57 p.m.)

4 HEARING OFFICER KAUFMAN: We are back on the record after
5 a short break for the parties to look for some lost documents.

6 Mr. Gilbert, would you please call your next witness?

7 Paula Moncado, M-O-N-C-A-D-O.

8 HEARING OFFICER KAUFMAN: Please raise your right hand.

9 Whereupon,

10 PAULA MONCADO

11 having been duly sworn, was called as a witness herein and was
12 examined and testified as follows:

13 HEARING OFFICER KAUFMAN: Thank you. Please state and
14 spell your name for the record.

15 THE WITNESS: My name is Paula Moncado, first name Paula,
16 P-A-U-L-A, last name Moncado, M-O-N-C-A-D-O.

17 DIRECT EXAMINATION

18 Q BY MR. GILBERT: Ms. Moncado, how are you?

19 A I'm good, thank you.

20 Q My name is Jeff Gilbert, I'm the attorney for the
21 Employer. You and I have never met, have we?

22 A Possibly in passing.

23 Q But we've certainly never talked --

24 A Not formally.

25 Q -- about this case.

1 A No. No.

2 Q Okay. And ma'am, are you here today pursuant to a
3 subpoena?

4 A Yes.

5 Q I would just ask that if I ask you a question that I use a
6 phrase or term or something that doesn't make sense, just a bad
7 question, if you don't understand it, ask me to rephrase it, is
8 that acceptable?

9 A Sure.

10 Q Are you under the influence today of any kind of substance
11 that would prevent you from testifying truthfully and honestly?

12 A No.

13 Q Are you currently employed, ma'am?

14 A Yes.

15 Q By whom?

16 A Durham School Services.

17 Q And how long have you been employed by Durham School
18 Services?

19 A Since June 4th, 2014.

20 Q And what was your job title at the time that you were
21 hired?

22 A Driver.

23 Q And ma'am, without getting into too many specifics, and I
24 certainly don't want you to have to disclose anything about
25 your physical health, but did you suffer some type of injury at

1 some point?

2 A Yes.

3 Q Okay. And were you placed on some type of modified duty?

4 A Yes.

5 Q And what did that entail? Where were you placed?

6 A I was placed in the dispatch office.

7 Q And how long then were you in the dispatch office?

8 A I was there from, I think January of -- this is going to
9 be roughly, because I know I gave the dates before and I don't
10 remember, but around January 25th --

11 Q Just an estimate is fine.

12 A -- until I think about three or four months. January to
13 May, so probably about four months.

14 Q Currently what tasks are you performing?

15 HEARING OFFICER KAUFMAN: I'm sorry, can we -- so the
16 record is clear, what time frame are you referring to, these
17 months.

18 THE WITNESS: January of this year

19 HEARING OFFICER KAUFMAN: This? Okay.

20 Q BY MR. GILBERT: What year, ma'am?

21 A 2015.

22 Q You started in June of 2014, correct?

23 A Correct.

24 Q So you didn't work in January of 2014, right?

25 A No.

1 Q Okay. And so what are you currently doing? Are you
2 currently driving or in dispatch?

3 A I'm driving.

4 Q And is it fair to assume that from June 4th, 2014 until
5 approximately January of 2015, you drove a bus?

6 A With the exception of a break, yeah.

7 Q Well, you're entitled to that.

8 A Yes.

9 Q And, ma'am, are you represented, if you know, by the
10 Teamsters Union?

11 A Yes.

12 Q Do you know what local?

13 A I would be guessing. I'm sorry.

14 Q Well, do you know Mr. Smith, who's seated at the counsel
15 table?

16 A No.

17 Q Okay. Who is your Union representative, if you know?

18 A Stacy -- I can't remember her last name. I'm drawing a
19 blank, I'm sorry. Her name is Stacy.

20 Q Alvelais?

21 A There you go. Alvelais.

22 Q Are you familiar, if you look up on that lectern there,
23 there should be a document that's been marked as ER-3, and I
24 can help you if you need some help, but it's a request for time
25 off slip.

- 1 A There's a few of them, yeah. It's one of these?
- 2 Q Okay. This was a blank one, but --
- 3 A Oh, a blank one? Oh, yeah.
- 4 Q Okay.
- 5 A Uh-huh.
- 6 Q Are you familiar with that document, ma'am?
- 7 A Uh-huh. Yes.
- 8 Q And how are you familiar with that document?
- 9 A I've submitted them for myself.
- 10 Q And can you describe for the hearing officer the process
- 11 that you follow in submitting a request for time off slip?
- 12 A Can you rephrase that?
- 13 Q Well, yeah, yes, ma'am. You have to get the slip, right?
- 14 A Right.
- 15 Q Who do you get it from?
- 16 A Okay, at this time?
- 17 Q In the past, when --
- 18 A In the past. Okay, that's why I was asking.
- 19 Q Okay.
- 20 A For time reference.
- 21 Q Okay.
- 22 A Originally --
- 23 Q Between January --
- 24 A Initially --
- 25 Q Between the time that you started, June of 2014 --

1 A Okay.

2 Q -- and May of 2015.

3 A Okay. Thank you. I would request the time off slip from
4 Michelle Dorton in dispatch.

5 Q Okay. And ma'am, do you know Michelle Dorton?

6 A I just know her as a co-worker.

7 Q Okay.

8 A And that she has a tag, a name -- you know, she has a
9 badge.

10 Q And what does her badge say?

11 A It says her -- it says Michelle Dorton, head dispatcher.

12 Q And where is that tag or badge?

13 A It was always hanging on her monitor so you could see it,
14 like from where you are, I could see it slightly on the monitor
15 on her computer monitor, facing outward towards the rest of the
16 office.

17 Q And -- okay. And so you would request this time off slip
18 from Ms. Dorton.

19 A Uh-huh.

20 Q Is that a yes? And I don't mean --

21 A Yes.

22 Q -- to be rude.

23 A I'm sorry. Yes, and then I would fill it out and then I
24 would give all the copies back.

25 Q To whom, ma'am?

1 A To Michelle.

2 Q Okay. And when you gave them back -- how did you know to
3 give them back to Michelle?

4 A She told me they go back to her.

5 Q Okay. And when you gave them back to Michelle, did she
6 comment in any way?

7 A Sometimes she would say, I can't guarantee it'll be
8 approved.

9 Q Okay.

10 A It may or may not be approved, or she would say they're
11 approved by management. Management makes the decisions.

12 Q Okay. And then after you provided the slip to Ms. Dorton,
13 how did you find out whether or not your request was approved?

14 A Well, I would have to ask her if it had gone through. I
15 would wait, like, maybe a week or so. If it wasn't eminent and
16 then I would ask her and then she would say that they hadn't
17 been returned to her yet by management, but she'll check on it
18 for me. And then the next day or so I would receive a notice,
19 which is the pink copy, the employee copy. That would be given
20 to me. I think it would be put in my box, my slot.

21 Q Okay. And how would it indicate that it was approved?

22 A It would be signed at the bottom --

23 Q Okay.

24 A -- by the manager.

25 Q And who was the manager who signed that?

1 A Let's see, initially they were being approved by Paul, who
2 was the old DM.

3 Q Okay.

4 A And then that's who would be on there, and then after he
5 left, it would be Sandra, Ms. Sandra Wilson.

6 Q Okay. Did you ever get a request for time off approved
7 that wasn't signed by Ms. Wilson?

8 A I'm -- I may have gotten one from Ron because when Paul
9 left, Ron had to do another one -- he had to replace the one
10 that was missing for me, so he did sign it.

11 Q Okay. So you testified a second or you -- saying though
12 that the process has changed recently?

13 A Right.

14 Q Well, how has the process changed?

15 A I no longer get these either from Michelle or turn them
16 into Michelle. I am supposed to get them from Sandra Wilson,
17 the operations manager.

18 Q Okay. And that's the only change that you know of?

19 A That's the only change -- and I only know it by -- not
20 formally, just by doing, by process of application. That's how
21 I know. I went in just last week, last Friday, and it had
22 changed to that.

23 Q And how do you know it changed?

24 A I went in last Friday to request time off for the week
25 after next, and I was told by Michelle that -- she said, "They

1 don't come from me anymore, you have to get the slip from
2 Sandra."

3 Q Okay.

4 A So I went to get it from Sandra and filled it out.

5 Q Okay. And have you ever been verbally apprised by Ms.
6 Dorton that your vacation or that your time off has been
7 approved?

8 A I can't recall.

9 Q Okay.

10 A I can't recall that she's told me it has or hasn't.

11 Q Okay. But it's your testimony that in each instance when
12 your time off request has been granted, you've received a
13 signed copy from -- with the signature of Ms. Wilson?

14 A Right.

15 Q Okay. When you worked in dispatch, how did you receive
16 your daily assignments, so to speak?

17 A I worked a split shift in dispatch.

18 Q Can you explain what that means?

19 A That means that, like my route hours, which are from 6:00
20 a.m. to 9:00 a.m. and then a break, and then resuming from 2:00
21 p.m. to 5:00 p.m., I would go to dispatch for those hours.

22 Q Okay.

23 A I would drive there and stay and then drive home and then
24 drive back.

25 Q Okay.

1 A And stay. So I --

2 Q And -- go ahead, finish.

3 A There's different staff in the morning than there is in
4 the afternoon.

5 Q Okay. And so in the afternoon, how would you get your
6 work assignments?

7 A I would go into dispatch and ask if anyone needed to be
8 called, and that meant any parent of a child who's going to be
9 looking for the bus, that the bus is going to be late, so any
10 parent of a child on a late bus, they need to be called, so I
11 would go in and ask her if they needed to be called.

12 Q Who is her?

13 A Michelle, sorry. I would ask Michelle.

14 Q Let me ask you this way, just to expedite the process.

15 A Uh-huh.

16 Q Did Ms. Dorton ever make assignments of work to you?

17 A Yes. They were verbal.

18 Q Okay. And what types of assignments would Ms. -- or what
19 type of work would Ms. Dorton assign to you?

20 MS. NISPEROS: Objection, can I have some foundation as to
21 the assignment that's calling for a legal conclusion?

22 MR. GILBERT: Well, I would disagree that it calls for a
23 legal conclusion. I'm not -- the law defines what assignment
24 -- to constitute an assignment under Section 211 entails and
25 the summary term assignment isn't the legal definition. I'm

1 trying to figure out how you got on a daily basis what your
2 work duties were going to be.

3 A Correct.

4 Q And so you testified that you would come in sometimes and
5 you would ask who you were supposed to call.

6 A Correct. I would ask if there were any parents that
7 needed to be called. She would hand me the route sheet with
8 the contact information on it, and I would sit down and begin
9 making calls. Other than that, the general duties were to
10 answer the phone whenever it rang, to call out information on
11 the radio to a driver for an ETA.

12 Q And what does that stand for?

13 A Estimated time of arrival for a driver to a parent's home,
14 to a child's home, and that was the cycle of things. It was
15 always busy like that, so other than answering the phones and
16 getting on the radio, there isn't anything else unless
17 someone's -- you know, all the duties kind of come from the
18 phone calls, you know, so you answer the phones and you help
19 them with the information. And she would ask me to go get
20 things off the printer.

21 Q Okay. Who's she?

22 A I'm sorry, Michelle. She would just say, Paula, could you
23 go get this off the printer? And I would just get up and go
24 get it off the printer and bring it back and it would be a
25 route that she printed, because the printer is located out of

1 the office and down the hall.

2 Q When you were in dispatch, who did you believe was your
3 supervisor?

4 A I thought it was Michelle.

5 Q The -- are you familiar with an employee by the name of
6 Sharon?

7 A Yes.

8 Q Do you recall an incident involving you, Sharon and
9 Michelle Dorton?

10 A Yes.

11 Q Can you -- do you recall when it happened?

12 A (No verbal response).

13 Q Approximately?

14 A Probably in April, mid-April, probably.

15 Q And that would be 2015?

16 A Of 2015.

17 Q Okay. And can you just --

18 A Sure.

19 Q -- testify for the record what happened?

20 A Sure. It was busy in dispatch for the setting. It was
21 busy as far as phones ringing, and then there was a dead
22 moment, you know, there was down time, and Sharon and I were
23 talking, we were just talking quietly among ourselves, personal
24 chit chat, and Michelle announced fairly loudly, "Excuse me,
25 are you two still on the clock?"

1 And we looked at her and, "Yeah."

2 "Then I expect you should be working," is what the answer
3 was.

4 Q And did you go back to work at that time?

5 A Yes, we did. And there was one other person in the office
6 too.

7 Q Who else was in the office?

8 A Maria Lopez.

9 Q Okay. At any time, ma'am, did you ever talk with Sandra
10 Wilson about how she expected you to get your daily job duties?

11 A Yes. That was in the beginning of the modified duty.

12 Q And what did Ms. Wilson tell you?

13 A And she would say, you can get that from Michelle.

14 Q And you can get -- when she said "that," what was she
15 referring to?

16 A That information, you know, what type of work will I be
17 doing, you know, and what am I supposed to be doing, and she
18 said you could see Michelle for that, your duties, answering
19 the phone -- you could see her. And she would be the one that
20 I would ask. And the same went for if I was going to leave
21 early.

22 Q Did Ms. Dorton, while you were in dispatch, ever verbally
23 counsel you about your work performance?

24 A Yes.

25 Q Can you describe for the record what occurred in those

1 instances?

2 A She made a comment on the type of question I was asking,
3 and it was derogatory.

4 Q Okay. Can you give us more detail, please?

5 A Sure. I asked her -- the setting was that a driver was
6 working really, really hard and taking extra children on his
7 bus and already the parents are calling for estimated time of
8 arrival. And so since the driver had just got there, I asked
9 her, you know, who the driver was, and she told me who it was
10 and then I said, okay, so should I -- I'm trying to say, you
11 know, I was tentative. Should I ask him for an ETA or, you
12 know, so I said -- so what should I do? And she just looks at
13 me and she says, "What do you think? I'm not even going to say
14 anything. What do you think you should do?" And because I
15 didn't want to step on anyone's toes, in my mind, I was like
16 floored. I don't know. I was very embarrassed because she
17 said this very loudly. She just laughed and like, "I'm not
18 even going to -- I want you to figure this one out." And she
19 started talking to me like I was a child. And I go, "I have no
20 idea." I mean, it just threw me. I said, "I have no idea."
21 And she says, "Get an ETA." And that was, to me, that was
22 counseling me on my performance. I felt chastised. So as far
23 as counseling went, I didn't get any better information, I got
24 an answer ultimately, but --

25 Q Okay.

1 A -- not really any information that would be useful.

2 Q Any other instances you can recall where you felt like Ms.
3 Dorton was assessing or evaluating your work performance?

4 A Yeah. I'm trying to remember. I did have an incident
5 that stemmed from one of her evaluations like that, one of her
6 comments.

7 Q Well, why don't you tell us about that?

8 A Okay. So on that same day, she had done this I think
9 three different times and at the last time, she being Michelle,
10 at the last comment that she made to me, I told her, I said, "I
11 don't even need to be here."

12 And she says, "Well, I didn't ask you to be here."

13 I said, "No, seriously, I'm not taking this expletive,
14 expletive from you. I don't even need to be here. I don't."

15 And she said, "Well, you can stay or you can go, but you
16 know, whatever you decide you do, you make sure you run and
17 tell Ron that you're leaving, because I'm not your boss."

18 And I said, "Oh, now you tell me." And I went and I left.
19 I was just so -- had it, had it with her attitude that day that
20 I left and I went straight to Ron and Ron advised me to write
21 up an incident report, and so I went home right away, I kind of
22 put it in my phone how it went, and then I sat down later. I
23 went in the next day and I wrote it all out for them.

24 Q For them meaning who?

25 A My manager, Ron and Sandra.

1 Q And did ultimately, did you ever file a grievance with the
2 Union about Ms. Dorton?

3 A Yes, I did, I filed a grievance based on that incident
4 with Stacy and I received an email from Stacy saying that she
5 got the -- I scanned it and sent her a copy. I received an
6 email from Stacy that she got the information and then I
7 received text from Maria Lopez, who is my shop steward, saying
8 that there was going to be a meeting about it, and then -- then
9 either that day of the meeting or the following day one of the
10 dispatchers lost a family member and then I guess everybody was
11 caught up in that, or because that person was gone, maybe they
12 couldn't cover for us to have the meeting. So nothing really
13 ever came of it as far as I know.

14 Q Was the agreement still pending, if you know?

15 A I believe it would still be pending. I haven't followed
16 up with Stacy on it yet.

17 Q And when you were testifying a second ago you said
18 something to the effect of now he told me.

19 A Now you tell me.

20 Q What did you mean -- what is it -- what did you mean by
21 that?

22 A I meant -- because all of these things that she's
23 directing me to do in my assignment, you know, and she's
24 verbally giving me commands to follow, that now she's telling
25 me she's not my boss. She's also deciding whether I can leave

305

1 early or not. Because I was on modified duty I would have to
2 go to the clinic and going to the clinic would be about an
3 hour, and that would put me over my daily hours. So I would
4 assume I -- if I went to the clinic in the morning after my
5 three-hour shift that I would be allowed to take an hour off,
6 or you know, so it would be -- I would ask -- I would ask
7 Sondra and she would say, "Clear it with Michelle."

8 So then I would ask Michelle and sometimes she'd say, "No,
9 you need to stay," or, "Yeah, I guess you could leave." But
10 most of the time she wanted me to stay.

11 HEARING OFFICER KAUFMAN: Did you have to fill out a form
12 for these requests to leave early?

13 THE WITNESS: No, I didn't. It was verbally. Because it
14 was a daily -- it's a daily allotment. It's not a -- how do I
15 say it? It's --

16 Q BY MR. GILBERT: You're not asking -- well --

17 A I know. I know. I'm trying to clari --

18 Q No, go ahead. Absolutely. I don't want to interrupt.

19 A Yes. It's -- I'm asking -- as of that day, it's just like
20 I had an appointment I had to go to, but the job is paying me
21 to go to that appointment. I'm getting paid to go to the
22 clinic.

23 HEARING OFFICER KAUFMAN: Okay.

24 THE WITNESS: So it would run me over my daily amount of
25 time. I'm sorry.

1 HEARING OFFICER KAUFMAN: Okay.

2 Q BY MR. GILBERT: And so were you receiving overtime then?

3 A If she told me to stay it was not considered overtime; it
4 was just considered more than my guaranteed six hours because
5 overtime is paid upon more than eight.

6 Q So let's, for the record --

7 A Uh-huh.

8 Q -- because the Hearing Off -- you've got to understand,
9 the Hearing Officer isn't familiar with our business and --

10 A Okay.

11 Q -- you've just used a new term that maybe we need to
12 explain.

13 Does -- in the bus industry traditionally, or at Durham,
14 do they -- if your route takes you three hours, or you work
15 three hours per day, is there a guaranteed minimum you receive?

16 A There's a -- yeah, there's a guaranteed minimum and I want
17 to say it's -- some -- there is a different guarantee in the
18 summer then there is -- now there's not -- I think it's five
19 and a half hours is what it is. You're guaranteed five and a
20 half hours.

21 Q And so even if you only work four you get paid for five
22 and a half?

23 A I believe so.

24 Q Okay.

25 A I haven't had that happen. I mean -- we usually have a

1 lot of work to do. We have a lot of kids to --

2 Q You need more seniority.

3 A -- take to school.

4 Q Good.

5 A Yeah.

6 Q But again, if Michelle told you to stay in those
7 instances, would you --

8 A I would stay. I wouldn't say no, believe me. I would
9 stay.

10 Q Have you ever heard Michelle cha -- well -- ever -- All
11 right. You ever heard Michelle talk to drivers over the radio
12 about their job performance?

13 A I only recall -- I only recall an instance once. She was
14 trying to fill routes and somebody was saying that they're not
15 going to do it and she was saying, "Yes, you are. You're going
16 to -- you can't do that. No. No. No. No. You can't do
17 that."

18 MS. NISPEROS: Objection. Introducing hearsay into the
19 record.

20 THE WITNESS: But --

21 MS. NISPEROS: We don't know who this outside person is.
22 They are not physically present.

23 HEARING OFFICER KAUFMAN: Mr. Gilbert?

24 MR. GILBERT: Well, it's not being offered for the truth
25 of the matter, it's just being offered as to what she said. I

1 mean, her position would be authority she was exercising, so.

2 THE WITNESS: I couldn't --

3 HEARING OFFICER KAUFMAN: I would agree. I don't think
4 it's being offered for the contents of the statement. Thank
5 you.

6 THE WITNESS: That's it or?

7 MR. GILBERT: Well, no -- I mean you can continue --

8 THE WITNESS: Oh, okay. I couldn't tell you the name of
9 the driver because they have route numbers and -- so I wouldn't
10 even know who it was anyway. I would just -- I just know it
11 was a male driver that she was talking to and she was, "No.
12 No. No. You can't do this to me. You're going to -- you need
13 to go. You need to pick up this route. You can't do this to
14 me. You can't leave me like that." You know.

15 Q BY MR. GILBERT: And is there a perception among -- this
16 is based on your experience. Is there a perception among
17 drivers that Michelle has favorites?

18 A There is.

19 Q Would you consider yourself to be one of her favorites?

20 A No.

21 Q Do you know -- do you have firsthand knowledge about Mi --
22 how Michelle handles requests for time off from her favorites?

23 A No.

24 Q Okay.

25 HEARING OFFICER KAUFMAN: Ms. Moncado, the incident that

1 you were just talking about with Dorton that led to a grievance
2 filed by Sonia?

3 THE WITNESS: Stacy.

4 HEARING OFFICER KAUFMAN: Stacy. I'm sorry.

5 THE WITNESS: That's okay.

6 HEARING OFFICER KAUFMAN: Do you remember the dates? Or
7 can you estimate the dates? I know you said it was between
8 January and May 2015, but --

9 THE WITNESS: The date of the incident?

10 HEARING OFFICER KAUFMAN: Yeah.

11 THE WITNESS: I think that was in -- I think that was in
12 April, and unfortunately I don't have my phone with me or I
13 would love to look it up. I mean -- I have an email from Stacy
14 that -- for that date, but I can't remember.

15 HEARING OFFICER KAUFMAN: Okay. That helps. Thank you.

16 THE WITNESS: Uh-huh.

17 Q BY MR. GILBERT: Did you ever talk to Ms. Alvelais about
18 Ms. Dorton?

19 A Yes, I have.

20 Q And in those conversations did you ever express to Ms.
21 Abalize that you considered Ms. Dorton to be your supervisor?

22 MS. NISPEROS: Objection. This is hearsay.

23 MR. GILBERT: How is it hearsay? It's not hearsay. It's
24 absolute -- I mean -- different objections, but did you tell
25 her you believed her to a supervisor is not hearsay.

1 HEARING OFFICER KAUFMAN: And the witness is here --

2 MR. GILBERT: Right.

3 HEARING OFFICER KAUFMAN: -- so she can --

4 MR. GILBERT: That's what I'm saying.

5 HEARING OFFICER KAUFMAN: I'm going to allow it. Go
6 ahead.

7 THE WITNESS: Okay. In my conversation with Stacy I said
8 yes, I said she's -- I said she is the -- I made this comment.
9 I said, "She -- she's the head dispatcher," I -- and I was
10 angry and I said, "She's the head dispatcher," and I said, "You
11 know what," I -- "and I'll tell you, that's the most
12 unprofessional person I've ever witnessed that I've had to
13 answer to."

14 And there's a different between a head dispatcher and a
15 lead dispatcher and if she wants to be the lead dispatcher then
16 she would be leading by a much more professional tone. Head
17 dispatcher, it just means like -- it seems like she could boss
18 anybody around or have an attitude and everybody -- and she's
19 very loud and you -- you kind of feel intimidated by her. I
20 did have that conversation with Stacy.

21 Q BY MR. GILBERT: That was a conversation that you had with
22 her as part of the grievance?

23 A Correct. Roughly in April of this year.

24 Q Did you ever witness Ms. Dorton assign work to other
25 individuals that were working in the dispatch office? For

311

1 example, there's been some testimony by a woman named Becca; do
2 you know Becca?

3 A Yes.

4 Q Did you ever see Ms. Dorton --

5 A Oh, yeah. I remember -- yeah, Becca's not in there
6 anymore, she went to a different position. But yeah, I've
7 seen -- she's given her -- and I -- "You call this one. You
8 call this one," or, "Here's the routes, divvy them up."
9 Michelle has given them to Becca and said, "Here's the routes,
10 divvy them up," or you know --

11 Q Did you feel like --

12 A -- I've been there. Uh-huh.

13 Q -- when Ms. Dorton gave you assignments that you could
14 refuse to do them?

15 A No.

16 Q What's a split route, ma'am?

17 A A split route is a route that no one is doing because the
18 driver of that route has called in sick. So you take the
19 route. Say you have ten kids, I'll make it really easy.
20 They're to be picked up from one school. Say this is an
21 afternoon route because there's a morning where they're taken
22 in and there's afternoon where they're taken home.

23 So to explain either one, in the afternoon you would split
24 that among the drivers in -- that are dropping off children in
25 the location of the children that need rides.

1 Q Uh-huh.

2 A So you could split the route up that way.

3 Q And who makes decisions, based on your experience in
4 dispatch, who makes decisions about the assignment of split
5 routes, or splitting routes to driv -- among drivers?

6 A I think it's just the dispatcher who is on -- who is
7 there. If it's in the afternoon, that's going to be Michelle.

8 Q Okay. All right.

9 A She's the one that calls them out.

10 HEARING OFFICER KAUFMAN: Mr. Gilbert?

11 MR. GILBERT: Yes, ma'am.

12 HEARING OFFICER KAUFMAN: There was some testimony earlier
13 about who drivers go to with issues between the hours of 5:00
14 and 7:00.

15 MR. GILBERT: Yes, ma'am.

16 HEARING OFFICER KAUFMAN: Could you ask this witness that
17 question?

18 MR. GILBERT: Sure absolutely.

19 Q BY MR. GILBERT: And I don't remember what -- I think
20 you -- unfortunately I think you said your split shift ends at
21 5:00, correct? So --

22 A But do you want to know in my capacity as a driver?

23 HEARING OFFICER KAUFMAN: As a driver.

24 MR. GILBERT: Oh.

25 THE WITNESS: Okay. As a driver. Sure.

1 MR. GILBERT: Thank you. Yeah.

2 THE WITNESS: Yeah. Yeah.

3 Q BY MR. GILBERT: So, ma'am, if anything happens between
4 5:00 and 7:00 at night as a driver, who do you contact about
5 issues at that time?

6 A I'm going to call Michelle. She's the first -- she's in
7 the dispatch office. I'm going to call her.

8 Q Is there any -- is Sandra there between 5:00 and 7:00
9 typically?

10 A No.

11 Q Is Ron there typically between 5:00 and 7:00?

12 A No.

13 Q Is Eileen there typically between 5:00 and 7:00?

14 A No.

15 Q And are there ever instances, in your experience as a
16 driver, where you would need to contact someone at the company
17 to talk to them about things that you're experiencing on the
18 road?

19 A Yes.

20 Q What types of things?

21 A I'll experience something where a parent may not properly
22 have their child ready, if their child has special equipment,
23 adaptive equipment to be restrained or seated properly, safely,
24 or a safety vest or something like that. If that child comes
25 without that equipment to the bus, you know, because it's their

1 responsibility --

2 Q But that -- okay, and so I didn't ask a very good question
3 and I apologize.

4 A I'm sorry.

5 Q It's my fault.

6 A Okay.

7 Q 5:00 to 7:00. That period of time --

8 A Oh, you're talking about 5:00 to --

9 Q -- at night.

10 A -- 7:00?

11 Q Yeah. No, it's okay and that was my fault.

12 A Okay. From 5:00 to 7:00, that's about when my route would
13 end, but if I had something that I needed to discuss that I'd
14 saved for later, yeah that's when I would call. I would call
15 between 5:00 and 7:00 and I would -- a lot of times I would ask
16 Michelle, because she seems to know who else I would need to
17 speak to if she couldn't answer the question.

18 Q Okay.

19 A You know, I mean she either knew the answer or she said,
20 "You'll have to talk," if it was route specific she would say,
21 "You have to talk to your router."

22 HEARING OFFICER KAUFMAN: Can you recall any specific
23 instances when this happened? When something came up that you
24 had to call Michelle; can you recall any specific times --

25 THE WITNESS: Times that I've called her?

1 HEARING OFFICER KAUFMAN: -- any details?

2 THE WITNESS: It's kind of hard to remember.

3 MR. GILBERT: You know, I mean I don't want to speak for
4 the hearing officer, but obviously it's okay to say --

5 THE WITNESS: Yeah --

6 MR. GILBERT: -- you don't know.

7 THE WITNESS: -- I mean I -- I don't think I can recall
8 anything that pertained to the route other than I'm clear for
9 the day and this is what time. You know.

10 Q BY MR. GILBERT: So when you're on the -- in a route, do
11 you hear other people on the radio?

12 A Uh-huh. Yes.

13 Q Okay. And so to the Hearing Officer's point, did you ever
14 hear any other people --

15 MS. NISPEROS: Objection. This is again hearsay. It's
16 some statement over the radio that's now being brought into the
17 hearing. We don't have those people here.

18 HEARING OFFICER KAUFMAN: I don't think that would be
19 something that's admitted for the truth of the matter.

20 MR. GILBERT: No, it's --

21 HEARING OFFICER KAUFMAN: It's just to show --

22 MR. GILBERT: What types of communications are going on in
23 the evening, right?

24 HEARING OFFICER KAUFMAN: Yeah, I'll allow it.

25 Q BY MR. GILBERT: So again, so you may not remember

1 anything with you, but do you recall anything in particular
2 with any other drivers that were raised between 5:00 and 7:00,
3 or in the evening, or anything like that? An accident or a --
4 parents aren't home and I'm trying to drop a kid off, anything
5 like that?

6 A Oh, yeah. I -- well, it -- that's happened roughly around
7 4:30 to 5:00. I mean, you know, because I'm usually off the
8 radio by 5:00.

9 Q I see. Okay.

10 A So I've shut it down. Right now I'm off -- I'm off as
11 early as 4:00.

12 Q Okay. So, just so the record's clear, your knowledge of
13 what occurs between 5:00 and 7:00 is limited because that's not
14 when you're in the bus or working?

15 A I'm not -- yeah, I'm no longer on the radio at that time.
16 Uh-huh.

17 MR. GILBERT: Nothing further.

18 HEARING OFFICER KAUFMAN: Cross?

19 MS. NISPEROS: I do have some questions. Just a moment.

20 MR. GILBERT: While we're waiting for cross-examination,
21 we have a witness that is no longer employed by the company
22 that's been served with a subpoena. I -- she can get off
23 between 9:00 and 11:00 tomorrow. If Ms. Moncado gets done
24 today before 5:00, which likely she will, you know, I don't
25 mind calling Ron or another witness, but is there a way that we

317

1 can agree that we can then -- you know, fit that other witness
2 in at 9:00?

3 HEARING OFFICER KAUFMAN: Yes. Absolutely.

4 MR. GILBERT: Okay.

5 HEARING OFFICER KAUFMAN: Yes.

6 MR. GILBERT: Can I ask one follow up; it just came to my
7 head?

8 HEARING OFFICER KAUFMAN: Sure.

9 MR. GILBERT: I just --

10 HEARING OFFICER KAUFMAN: Go ahead. She hasn't started
11 her --

12 MR. GILBERT: Okay.

13 HEARING OFFICER KAUFMAN: -- cross, go ahead.

14 MR. GILBERT: Yeah.

15 Q BY MR. GILBERT: Ma'am, the incident involving -- well,
16 okay -- the incident involving Ms. Dorton that led to the
17 grievance, and only if you know this. I -- you may -- do you
18 know if that occurred during the time that the staff employees
19 were trying to organize or trying -- before the election
20 occurred? Does that question even make sense?

21 MS. NISPEROS: Objection. I don't --

22 HEARING OFFICER KAUFMAN: I --

23 MS. NISPEROS: -- think that question makes sense. I
24 think there's a problem with the form.

25 HEARING OFFICER KAUFMAN: Are you --

1 MR. GILBERT: I'll rephrase it.

2 HEARING OFFICER KAUFMAN: Okay.

3 Q BY MR. GILBERT: So that incident occurred, correct?

4 A The incident occurred.

5 Q Yes. Do you know if it occurred while -- or before the
6 employees were -- or close to the time that the employees, that
7 is the staff employees, were going to vote whether or not to be
8 unionized?

9 MS. NISPEROS: Again, objection. The relevance. This is
10 something that occurred between not the workers at issue in
11 this current petition.

12 MR. GILBERT: Well --

13 MS. NISPEROS: And Dorton.

14 MR. GILBERT: -- the notes by the Union's representative
15 indicate that there was a concern by Ms. Dorton that the
16 Employer was going to challenge her because she was a
17 supervisor. If the incident occurred at a time -- and I --
18 when the election was pending, then that might explain, at
19 least I can make the argument that that explains why Ms. Dorton
20 would say, "I'm not your boss."

21 Because clearly by the notes that have been produced there
22 was a concern by Ms. Dorton about her inability to vote.

23 MS. NISPEROS: I --

24 MR. GILBERT: So I'm trying to establish the timing.

25 MS. NISPEROS: Maintain my objection. I ca -- I mean,

1 they're going to be -- that's not the initial question that was
2 asked. It was as to --

3 HEARING OFFICER KAUFMAN: Well, at a minimum it helps to
4 establish the timing of when the incident took place. So I'm
5 going to allow it.

6 MS. NISPEROS: And I don't -- I also -- I would request
7 additional foundation, how do we know that this particular
8 witness even knows -- is aware of the --

9 MR. GILBERT: I asked her --

10 MS. NISPEROS: -- current petition matter.

11 MR. GILBERT: -- if she --

12 Q BY MR. GILBERT: Okay. Did you -- ma'am --

13 MS. NISPEROS: And the timing.

14 Q BY MR. GILBERT: Were you aware that the staff employees
15 were seeking to become unionized?

16 A No.

17 Q Okay. Then I -- it's not --

18 A First heard yesterday.

19 Q Okay.

20 A Or the other -- this week, early this week. I never knew
21 what was going on.

22 Q Okay. Fair enough.

23 A No.

24 Q Ma'am, did you ever submit anything in writing --

25 MS. NISPEROS: Are we continuing with the direct

1 examination?

2 MR. GILBERT: -- to the company --

3 I was just trying to set -- trying to find out if I could.

4 Yes, I am.

5 Q BY MR. GILBERT: Did you ever submit anything to the
6 company in writing that might establish the date of when this
7 incident with Michelle Dorton occurred?

8 A Yes. It's called an incident report.

9 Q And that was --

10 A And I'm not being rude --

11 Q -- dated -- No. No. No.

12 A -- either. It's called an incident report.

13 Q I deserve it sometimes.

14 A I ca -- if you wanted an exact date, I would have to
15 contact you later on that because that information is at home.

16 Q No, I understand. But do you recall if you dated the
17 incident report?

18 A Oh, yes. I put the date on it. Yes.

19 Q All right.

20 MR. GILBERT: Nothing further.

21 THE WITNESS: Yes.

22 HEARING OFFICER KAUFMAN: Does the Employer have a copy of
23 that incident report?

24 MR. GILBERT: I'm going to get one. I don't have it
25 present.

1 HEARING OFFICER KAUFMAN: And if the Employer responded --

2 MR. GILBERT: Yes.

3 HEARING OFFICER KAUFMAN: Okay. Thank you.

4 CROSS-EXAMINATION

5 Q BY MS. NISPEROS: I'm going to mispronounce your name, I
6 think, I apologize in advance. Ms. Moncado.

7 A That's correct.

8 Q My name is Dalisai Nisperos. I'm an attorney with
9 Teamsters Local 853. I'm going to ask you a couple of
10 questions about the testimony that you've given just now. And
11 I'll let you know that if I ask you a question that's not
12 clear, or you don't understand, can you please let me know?

13 A Okay.

14 Q Now, you testified that there was an incident where you
15 were engaged in a, I believe you said personal chit chat, and
16 that Michelle Dorton asked if you were still on the clock,
17 something to that effect; do you recall saying that?

18 A Correct.

19 Q And as -- isn't it true that as a con -- you know, after
20 that incident happened, you didn't suffer any negative
21 consequences in terms of discipline from Michelle Dorton; is
22 that fair to say? In other words, she didn't --

23 A Per that incidence? Per that -- I guess, reprimand by
24 her? I mean, when she said, "I expect you to be working," did
25 I suffer anything be -- related to that?

1 Q Anything negative beyond --

2 A Is that negative be --

3 Q -- anything negative in terms of your pay; did you get a
4 write up; did you get something noted --

5 A No.

6 Q -- on your record anywhere?

7 A No.

8 Q Okay. So you didn't get a -- that would include you never
9 got a verbal -- excuse me, or a written warning, nothing like
10 that?

11 A No, not after that. No.

12 Q Does Michelle have the ability to give you a written
13 warning? The authority?

14 A I don't know.

15 Q You don't know. Okay. And you also testified about an
16 incident where you were discussing an ETA; do you recall your
17 testimony?

18 A Correct.

19 Q Okay. And as a result of that interaction with Michelle,
20 is it -- isn't it true that you didn't suffer a negative
21 consequence in terms of you didn't get any written warning,
22 nothing in your file, saying that you completed your job duties
23 poorly, something -- nothing like that?

24 A No, I did not.

25 Q And you haven't ever gotten anything -- nothing -- during

1 the time that you were working in dispatch, when you were on
2 your light duty, you've never gotten anything put into your
3 file by Michelle Dorton saying you did a poor job of, you know,
4 for example this ETA, "She did a poor job," goes in your file;
5 that -- that's never happened?

6 A I don't know. I would say no, be -- unle -- I mean, if
7 the policy that they have to pass it by me before it goes in my
8 file. I would say no.

9 Q Okay. And you also mentioned another incident where you
10 didn't appreciate Michelle Dorton's treatment and you took the
11 issue to Ron. And I believe you testified that you left the
12 office after that because you didn't appreciate the way that
13 she was treating you. Is that?

14 A I was upset. Yes.

15 Q Okay.

16 A So I left.

17 Q Okay. And so you did you did actually leave after that, I
18 guess, interaction with Michelle? That -- that's fair to say,
19 correct?

20 A And I stayed out of that office after that for a little
21 while.

22 Q Okay.

23 A Uh-huh.

24 Q And as result of you leaving that office, you were not
25 reprimanded by Michelle for being absent? You didn't get a

1 write up from her --

2 A No.

3 Q -- a failure to perform work?

4 A No.

5 Q Anything like that? Okay. And so it sounds like -- isn't
6 it fair to say that Michelle didn't force you to stay? You
7 did, in fact, get up and leave when you -- you just did?

8 A Because she told me she's not my boss and that I'd better
9 go tell the operations manager. She did not force me to stay
10 that day.

11 Q Okay. And you also referred to five and a half minimum
12 hours.

13 A I think.

14 Q So -- you -- and I think you -- you referred to a
15 guaranteed minimum?

16 A I think. Yeah.

17 Q Is that some -- the thing that you're referring to, is
18 that something -- that's not a rule that Michelle sets up?

19 A I --

20 Q Correct?

21 A You know, I can't recall where -- if it's just something
22 you hear that the -- all the peop -- that all the drivers are
23 aware, or if it's in the handbook, I don't remember.

24 Q Okay.

25 MR. GILBERT: I think we would stipulate, Your Honor, it's

1 A Yes, correct.

2 Q I'm the Employer's attorney. I'm going to ask you some
3 questions and I think you've been in here for the testimony so
4 you've probably heard this spiel before, but if there's
5 something you don't understand, just ask me to rephrase it and
6 I will; is that acceptable?

7 A Yes.

8 Q And are able to testify truthfully today?

9 A Yes.

10 Q Sir, what's your -- who -- are you currently employed?

11 A Yes.

12 Q By whom?

13 A Teamsters Local 853.

14 Q And what's your current job title, sir?

15 A Organizer.

16 Q How long have you been an organizer for Teamsters Local
17 853?

18 A Officially, four years October the 16th of this year.

19 Q So is it, my math isn't very good, but is that -- would
20 that be October the 16th of 2011?

21 A Yes, correct.

22 Q And could you just generally your duties as an organizer?

23 A Sir, I have a lot of functions as a organizer, but just to
24 give you an ideal (sic). So one of my main responsibilities as
25 an organize is to inform the unorganized workforce about their

1 rights to organize under the National Labor Relations Act and
2 under the National Labor Relations Board. So my primary
3 function is to just to show the people, or show them the path
4 on their -- protect their rights that they have under the gui
5 -- under the Act. So that's one of my responsibilities; that's
6 my primary function as an organizer for me personally, to
7 organize the unorganized.

8 Q And doing, sir -- so, sir -- man, sorry about that. Do
9 you -- when you're organizing a group of employees, do you
10 identify one or two employees who work at the facility you're
11 organizing to kind of assist you in your organizing effort?

12 A Not necessarily. So I like to inform that any workplace,
13 everyone is a organizer. Everyone is as valuable as the other
14 person. So they're -- I don't target individuals. You know.
15 Some people step up and they perform certain tasks, but it's
16 always a team effort when I'm involved in a campaign.

17 Q Do you -- I've given you what's been marked as Employer
18 Exhibit 27. Can you identify that document, sir?

19 A I can identify it as Employer Number 27.

20 Q Okay, so these are not your notes?

21 A That is correct. This are not my notes.

22 Q Do you know whose notes they are?

23 A These are Steve Bender's notes.

24 Q Steve Bender. Okay. And how do you know that?

25 A Because Steve showed it -- I've seen them. You know,

1 Steve is one of my colleagues, my coworkers, so I've seen these
2 notes in our organizing campaign. We debrief and brief.

3 Q Do you also take notes, sir, during an organizing
4 campaign?

5 A So at times I do take notes. Yes, that is correct.

6 Q Okay. And, obviously, I'm not concerned about your
7 efforts with other facilities and -- I'm more -- I'm only
8 concerned with Durham. Did you take any notes connected with
9 the organization of -- or the organizing effort at --

10 MS. NISPEROS: Objection. We've already covered these off
11 the record. Never mind. Withdraw the objection.

12 Q BY MR. GILBERT: Any notes with respect to the organizing
13 effort at Durham School Services by the staff employees in
14 2015?

15 A No.

16 Q Okay. You did exchange text messages, correct, with some
17 employees?

18 A That is correct.

19 Q And you exchanged text messages with Michelle Dorton,
20 correct?

21 A Yes.

22 Q And do you still have copies of those text messages?

23 A So I have a iPhone, so it's in my iPhone. Yes.

24 Q And is that the information that was produced and has been
25 marked as Employer's 2, if you know; it's on the lectern there.

331

1 But if --

2 MS. NISPEROS: Does the witness have Exhibit 2?

3 MR. GILBERT: I just said it --

4 THE WITNESS: I --

5 MR. GILBERT: -- would be on the lectern. I would assume.

6 THE WITNESS: Yeah. I mean it may be up here.

7 HEARING OFFICER KAUFMAN: Do you want to take a moment to
8 locate it?

9 THE WITNESS: Okay. Thanks.

10 HEARING OFFICER KAUFMAN: There should be a colored copy.

11 THE WITNESS: Yeah, the green looking -- I'm sorry. Yes.
12 Oh, yes.

13 Q BY MR. GILBERT: And, sir, I just -- those are your text
14 messages that you exchanged with Ms. Dorton?

15 A Yes.

16 Q And that constitutes a complete copy of the text messages
17 you exchanged with Ms. Dorton?

18 A Yes.

19 Q Did you know Ms. Dorton prior to the current organizing
20 effort -- or the organizing effort that took place in 2015?

21 A Yes.

22 Q And how did you know Ms. Dorton?

23 A So, from my recollection, in 20 -- in 2012, we had a
24 organizing campaign going on there at Durham Transportation in
25 Hayward and Livermore, in regards to the drivers. So during

1 that campaign I was visible, I was out there, and I had the
2 opportunity to meet other people in different capacities at
3 both of those service centers, Livermore and Hayward I'm
4 referring to, and so the answer is, yes, sir.

5 Q And then, sir, are you familiar with the fact that the
6 staff employees tried to -- or had an organizing effort in
7 2014?

8 A Yes, I am aware.

9 Q Were you involved in that?

10 A So yes, I was involved.

11 Q Okay. And so did you also then develop a relationship
12 with Ms. Dorton during that period of time; that is 2014?

13 MS. NISPEROS: Objection.

14 MR. GILBERT: Okay. I'll rephrase.

15 Q BY MR. GILBERT: Did you have occasion then to meet with
16 Ms. Dorton during 2014?

17 A So from my rec -- from 2000 -- so I -- so I know that I --
18 I'm going to make this assumption; I just can't recall all
19 this. I go to a lot of meetings and everything. But I'm going
20 to make the assumption that I -- my answer is going to be yes,
21 that I was present in some meetings in 2014 in regards to the
22 organizing campaign with the admin personnel at Durham, Hayward
23 and Livermore.

24 Q So did -- the 2015 organizational effort. You said some
25 people step up. Did Ms. Dorton step up?

333

1 A She was a participant. She was a participant.

2 Q Okay. And I try to take good notes, but it's getting late
3 in the day, and I probably do as good as I should, but I
4 thought you said that people step up and take on -- take on
5 tasks or something --

6 MS. NISPEROS: Objection. It's been asked and answered.

7 HEARING OFFICER KAUFMAN: Yeah, the record will reflect,
8 but --

9 MR. GILBERT: I'm just laying a foundation.

10 HEARING OFFICER KAUFMAN: I'm going to permit him to go
11 ahead and refresh his recollection.

12 MR. GILBERT: I'm just trying to -- I'm just --

13 Q BY MR. GILBERT: Something with stepping and taking tasks,
14 right?

15 A Right.

16 Q Did Ms. Dorton take any tasks on?

17 A No, because in this particular campaign, 2015; I didn't
18 issue out any tasks.

19 Q Well, you were certainly in the room when Ms. Dorton
20 testified, correct?

21 A That is correct.

22 Q And you heard Ms. Dorton testify that she at a minimum
23 handed out cards and then received them back, correct?

24 A So I recall her tes -- I don't know her exact testimony,
25 but I was in the room -- I would say that's correct.

1 Q Okay.

2 A I don't recall her exact testimony.

3 Q Well, do you know if --

4 MS. NISPEROS: I'm sorry. I have to object because it's
5 calling for speculation at this point.

6 MR. GILBERT: That's what I was just going to --

7 Q BY MR. GILBERT: Do you know if Ms. Dorton facilitated the
8 collection of cards?

9 MS. NISPEROS: Objection. Leading.

10 MR. GILBERT: I would ask permission to question this
11 witness as a 6 -- under 611(c).

12 HEARING OFFICER KAUFMAN: Well -- two things first. I
13 don't think that question was leading because he asked if he
14 knew, but --

15 MS. NISPEROS: Oh, I --

16 HEARING OFFICER KAUFMAN: -- secondly, I will grant
17 permission to proceed under 611(c) with this witness because
18 he's clearly, you know, he's clearly in a position that's
19 adverse to the Employer in this hearing. So go ahead.

20 MS. NISPEROS: Request instruction to the witness from the
21 Hearing Officer as to what that means.

22 HEARING OFFICER KAUFMAN: In essence, this simply means
23 that he's entitled to ask you leading questions. Okay.

24 THE WITNESS: Thank you.

25 Q BY MR. GILBERT: But I will ask you, the foundation, do

1 you have a recollection of whether or not Ms. Dorton assisted
2 with the -- or facilitating the collection and distribution of
3 cards?

4 A So -- just hear it one more time, Geoff, please?

5 Q Sure. To your knowledge, did Ms. Dorton help you get
6 cards signed and then -- or did she distribute cards to the --

7 A Not to my knowledge.

8 Q Okay. You -- Mr. Bender -- on an organizing effect, do
9 you identify a primary organizer and a secondary organizer; is
10 that a fair way to say it?

11 A Well, not actually -- No, not 100 percent. So in our
12 organization everyone is a organizer whether you're a business
13 agent or principal officer, whomever you may be. So -- where I
14 come from, everyone is a organizer in our organization, so
15 that's how I, you know, that's the point that I get across when
16 -- especially new groups. Everyone is a organizer in our
17 organization.

18 Q All right. So let me rephrase it.

19 A Okay.

20 Q Mr. Bender works for you?

21 A Well, he works for our joint council -- he works for our
22 joint council. He doesn't directly work for me, but our joint
23 council.

24 Q Did Mr. Bender assist in the organizing effort with
25 respect to the staff employees in 2015?

1 A Yes, that is correct.

2 Q If we could talk about time spent, would you say that you
3 spent more time or Mr. Bender spent more time organizing the
4 staff employees in 2015?

5 A No, in actuality we both -- I would have to say we both
6 spent an equal amount of time. He was at one meeting. I'm
7 volunteering information, but he was at -- I was at the first
8 meeting and he was at the second meeting, so we just balanced
9 it out.

10 Q Yes, sir. Yes, sir. And so the second meeting was the
11 one that was reflected in the notes that were marked as
12 Employer's Exhibit 27?

13 A So I'll make that assumption. I wasn't present at this
14 meeting or anything, but I was -- I would like to say yes.

15 Q Okay.

16 A That's the second meeting -- that's the second meeting.

17 Q Okay. And did you ever have, sir, yourself any
18 discussions with any employees, the staff employees about the
19 company's indication that they might challenge Michelle
20 Dorton's vote?

21 A Yes, that is correct.

22 Q You did? Who did you speak with about that?

23 A So I spoke with Michelle in regards to that.

24 Q Okay. And can you tell me about the conversation, what
25 was said and by whom?

337

1 A So this was after the -- off the -- this is off the top of
2 my head. I just don't recall every day. So like I think the
3 -- this was received from the Employer like on the 21st or 22nd
4 of April, so like two or three days before the election, bef --
5 two or three days before the election, I called Michelle,
6 because it's getting closer to the election. I called Michelle
7 and informed her that the Employer had -- is going to challenge
8 your vote.

9 You as well as another individual. But I didn't tell her
10 the individual, but the Employer's going to challenge your
11 vote.

12 Q Anything else you can recall saying?

13 A Yes. And then I also told her though, that's -- you know,
14 that's normal practice. Sometime employers challenge the
15 eligibility of voters as well as the union challenge the
16 eligibility of the voters. And I told her that it's still our
17 position that she's a part of the appropriate bargaining unit
18 and we're going to stand fast on our position. And I spoke
19 with her about that.

20 Q Okay. And do you recall any response by Ms. Dorton?

21 A Well, of course, "Well, why," I mean, well I think -- I
22 don't know exactly, but her -- "Well, why. Why?" And I'm
23 trying to get her to understand, don't worry about it; it's not
24 a problem. It's just a tactic that employers use as well as
25 unions. I just didn't want to leave the employer out there,

1 I'm sorry.

2 Q Can you recall, sir, have you told me everything you can
3 recall about your conversation with Ms. Dorton regarding the
4 possible challenge of her ballot?

5 A Oh, in regards to the challenges? I'm sorry. I'm just
6 trying to think. You know, I do a lot of phone calls. Told
7 her don't worry about it. Oh -- Oh, that it may not even be
8 necessary to -- so I'm talking about the challenged votes.

9 So I go also into saying that it's not for the employer to
10 make that determination or the union, that a hearing officer
11 from the NLRB will make that determination and I just tried to
12 reassure her, don't worry about it; let it go through the
13 process; there's already -- there's a process in place; and
14 we're just going to go through the process.

15 And I told her that we're confident, as well -- but I
16 didn't say nothing about the Employer, but that we're confident
17 about our position and we're just going to stand fast. So.
18 Best of my recollection. So.

19 Q Anything else you can recall? From that conversation?
20 Again, I -- more -- I'm talking about the challenge process.
21 Anything that you can recall --

22 A Oh --

23 Q -- she said or you said?

24 A You know, I'm not for sure, but -- okay -- so. There is a
25 possibility that she had me on the speaker phone and that

339

1 someone wanted to ask me something else in regards to the
2 election. That's my recollection.

3 Q Do you know who that someone else could have been?

4 A Well, that someone is also a part of the appropriate
5 bargaining union.

6 Q Sherry Head, is that right?

7 A So I can't really --

8 MS. NISPEROS: Objection. This is calling for Section 7
9 protected activity information. It's not relevant, the name of
10 the person.

11 HEARING OFFICER KAUFMAN: Mr. Gilbert, what's the
12 relevance?

13 MR. GILBERT: Well, it seems that I should be able to test
14 this witness's version of events and by calling the indi --
15 other individuals that were involved in the phone call. Because
16 the in -- the Employer has information that that's not what was
17 said.

18 MS. NISPEROS: My objection stands and if the Employer has
19 this information then it should be offered in the -- to support
20 the objections in the offer --

21 MR. GILBERT: It was in the offer.

22 MS. NISPEROS: And so then the Employer knows the name and
23 it's still not relevant to this line of questioning.

24 MR. GILBERT: Okay, I'll just -- let's -- I'm just going
25 to call everybody. I'm just going to call everybody tomorrow

1 and we'll be here till Wednesday. That's fine. I understand.
2 It's not a big deal, you know. I'm tired of -- all I'm trying
3 to do is find out who else was privy to the conversation. I
4 can call all seven ladies. It's not a big deal. They're
5 all -- as you would note to me, they're all people that I have,
6 you know, can get here to testify, so I'm going to move on.

7 Q BY MR. GILBERT: Anything else, sir, that you recall
8 talking about during that conversation?

9 A Yeah. So -- so someone -- I'm assuming this is a
10 conversat -- I'm assuming this is a particular time we're
11 talking about in regards to the challenged vote. So like I
12 said, I thought that I was on speaker, so I know that other
13 people were asking me questions, and I think that I -- from my
14 recollection, that someone had said, "Well, we're just not
15 going to vote."

16 I said, "No. No. No. We got through the process. We'll
17 deal with the challenges as we move forward. Everyone else --
18 you're entitle -- everyone is entitled to their vote. No one
19 would never know how you voted." So I go into your secret
20 ballot election. It's imperative that you vote. If you want
21 to have a voice in the work -- in the workforce -- if you want
22 to have a voice at the table, then you need to exercise your
23 rights.

24 Q Okay. And I'm going to -- I appreciate it. Anything else
25 that you can recall?

341

1 A So -- nothing that I can recall at this very moment.

2 Q At any time during that conversation did you or anybody
3 else maintain that the Employer -- that the two individuals the
4 Employer had indicated they might challenge were both African
5 American, that there was racial overtones with respect to the
6 challenges?

7 MS. NISPEROS: Objection. He's --

8 MR. GILBERT: Okay. Go ahead.

9 HEARING OFFICER KAUFMAN: State your objection.

10 MS. NISPEROS: It's not relevant. We're talking about the
11 challenge, this -- racial overtones is not submitted as an
12 issue in the Employer's objections and so it's going beyond the
13 scope of the Employer's objections.

14 MR. GILBERT: What is submitted as an issue is that
15 representatives of the union told the eligible voters that the
16 Employer's decision to challenge was illegal. Racism is
17 illegal.

18 HEARING OFFICER KAUFMAN: Okay.

19 MS. NISPEROS: That's very -- objection stands. I feel
20 that Employer is recalculating its theory to fish.

21 HEARING OFFICER KAUFMAN: I believe that if that statement
22 were made, it could have had a tendency to coerce employees.
23 So go ahead. I'm going to allow that.

24 MR. GILBERT: Just --

25 THE WITNESS: So what's the question again, I'm sorry?

1 Q BY MR. GILBERT: Did you or anybody else on that phone
2 call raise the issue of possible racism by the Employer in
3 connection with the individuals they had identified to
4 challenge?

5 A So just for the record -- so I didn't make that -- so I
6 didn't make that claim or that accusation in regards to racism,
7 or in regards to the African American status. And if someone
8 else did it, then I just -- I always brush it off, so I don't
9 capture those things. So I can't say if it was said or if it
10 wasn't said in regards to African Americans, or blacks, or
11 whatever. I just know that I didn't say it. So --

12 And if someone -- I can't say if someone did or didn't say
13 it, because if they did say it, I just brush those type of
14 things off, because that's not even the issue that's at hand.
15 So I don't -- so I can't really -- so my answer is, I don't --
16 I'm not for sure. I just know that I didn't say anything like
17 that. I don't know if someone else commented or not. I just
18 don't know.

19 Q Okay. So it is possible then that --

20 A So yes. So anything is possible, so I -- you know, I just
21 don't -- I can't -- I can't say -- I can't say that someone
22 said it, or they didn't say it, but I can go on the record and
23 say that Rodney Smith didn't say it.

24 Q Thank you, sir. I appreciate that.

25 So, for example, you don't know whether or not Mr. Bender

1 said it, correct?

2 A No. So I wasn't at the meeting that Mr. Bender had, but
3 it is not probable that Mr. Bender said that. Mr. Bender is
4 well aware that that's not how we conduct ourselves in our
5 representation of potential members or members. So I wasn't
6 there, but it's not probable that Mr. Bender said it.

7 Q Okay. And, sir, when you were just -- again, I'm going to
8 ask one more -- one last time. Anything else you can remember
9 about this speakerphone call with Michelle Dorton and another
10 individual eligible to vote on or about April 20 -- or no, I
11 don't know if he gave the date, I apologize. But do you --
12 anything else about this speakerphone call?

13 A No. So when I give reference to the speakerphone call, I
14 was -- I -- you know, I'm on a -- I hear -- they're on the
15 phone, but I could hear that it's -- I mean, I know I'm on
16 speaker, so I don't know who else was around --

17 Q I was just trying to give you a reference as to what call
18 I was talking about.

19 A Oh.

20 Q So I'm just saying anything about that call that you can
21 tell me about that you can recall?

22 A I'm just trying to play it back, because I don't -- you
23 know, I'm trying to. Nothing that just -- so I'm not for sure,
24 but I always go over -- I always tell people this. This is
25 your opportunity to exercise your right. I tell them it's a

1 secret ballot. I say, "You don't put any identifiable marks on
2 the ballot." I say that an agent from the Board will be there.
3 So I just pretty much stick to my format, which is the
4 guidelines under the Act, and I just let that stand on its own.
5 Let it stand on -- let it stand and speak for itself.

6 Q Okay. So having said that, is there anything else you can
7 recall about that conversation?

8 A Nothing that I can recall off the top of my head.

9 Q Okay. Thank you. And you -- so you've told me everything
10 that you can recall you saying and then any of the participants
11 saying during that conversation?

12 A Well, see -- I just don't recall anything else that I
13 said. So when I go through my daily lives (sic) I can't just
14 grasp everything that people say to me. I deal --

15 Q Understood. I'm just asking -- so there's nothing else
16 you recall about that conversation? I'm not -- I'm not -- I
17 don't want make you -- I'm not criticizing you, I'm just asking
18 you if that's the case.

19 A I think -- well, so -- I don't know if it's this exact
20 conversation, but I'll offer this as well.

21 So I think that someone was talking about, "Oh, we
22 shouldn't vote if X, Y, and Z." But I'm saying that is the
23 wrong thing to do, we need to exercise our rights. We'll deal
24 with that later. So if any -- if I want to add anything,
25 that's what I would add.

1 Q All right. Thank you, sir.

2 And, sir, do you recall having any other conversations
3 with Ms. Dorton during the organizational effort that
4 culminated in the election on May 8th 2015, that is
5 conversations over the phone, other than the one you've just
6 described?

7 A I've had other conversations with Ms. Dorton as well as
8 other members of the petition appropriate bargaining unit.

9 Q Yes, sir. And I want to focus only on Ms. Dorton.

10 A Okay.

11 Q So do you recall how many other conversations you had, and
12 again -- well, let me ask you this. Do you recall
13 approximately when the organization -- when the organizing
14 effort started?

15 A Okay. So I can just give you a little --

16 MS. NISPEROS: I'm sorry. I'm going to have to object
17 because we're talking about conduct during the critical period
18 and the Employer is alleging that the -- whatever coercion
19 happened, or improper conduct happened during the critical
20 period.

21 HEARING OFFICER KAUFMAN: That's true, but the Employer
22 has also alleged that it thinks Ms. Dorton is an agent, and so,
23 is that where you're heading with these questions?

24 MR. GILBERT: Correct.

25 HEARING OFFICER KAUFMAN: Mr. Gilbert?

1 MR. GILBERT: Yes, ma'am.

2 HEARING OFFICER KAUFMAN: Okay. Go ahead.

3 THE WITNESS: I'm sorry. What was the question?

4 Q BY MR. GILBERT: That's okay. I don't remember it either.
5 I think the question was, do you recall approximately when the
6 organizing effort began with respect to the election in May of
7 2015?

8 A So I would have to say in -- I don't recall the exact
9 time. But if I look -- okay, so if I look at Employer Exhibit
10 2, I know that on April the 1st that Michelle was asking me,
11 "Anything yet," so I'm going to make the assumption that when
12 she sent that, it had started before April the 1st.

13 Now -- so -- it wasn't in February, so it had to be --
14 I'll make an assumption. It's either the middle part of March
15 or the latter part of March. I just -- that's the time window
16 I think I'm -- I feel comfortable saying.

17 Q And how did you learn that the employees, the staff
18 employees at Durham's Customer Service Center in Hayward were
19 interested in retaining -- their being represented by the
20 Teamsters Union?

21 A So which time? So I hear this -- this is an ongoing thing
22 that I hear about Durham. So, I mean, it's a ongoing thing,
23 whether it's --

24 Q Well, the organizing effort that culminated in the
25 election on May 8th 2015; how did you learn that they employees

347

1 were interested in organizing; that is the staff employees in
2 that instance?

3 A In this instance? So one of the drivers -- one of the
4 drivers made contact with me and informed me about it, one of
5 the drivers did. Yes.

6 Q Did you have any contact with Ms. Dorton, or any other
7 staff member, between the time that the petition was withdrawn
8 in 2014 and the time that the driver approached you in 2015?

9 A Yes.

10 Q Okay.

11 A Yes.

12 Q Who did you have contact with during that period?

13 A So in the capacities -- so it's different personnel that,
14 you know, when I go to Durham and Hayward, you know, I know the
15 ladies and they see me, so I -- you know, I have contact with
16 them. "Hey, how are you. How's the family." So I've been to
17 the facility numerous times whether it's Hayward or Livermore.

18 Q Okay. And that's a fair answer, so I -- let me ask you a
19 better question. Okay?

20 Did, other than in your official -- well -- other than in
21 your capacity as representing the drivers --

22 MS. NISPEROS: Objection. Assumes facts not in evidence.
23 I don't believe we've gotten testimony that he's representing
24 the drivers.

25 Q BY MR. GILBERT: Why were you at the Hayward facility and

1 seeing these women as you just testified?

2 A So there's a couple of reasons that I could have been
3 there. So there's a couple of reasons. So we have business
4 representatives that sometimes we're riding together and make a
5 stop over here, we get out, we go inside different locations,
6 whether it's Durham, Costco. So that could have been one of
7 the times that I'm giving reference to, is we were -- I was
8 with the agent.

9 Q And do you guys go into facilities where you don't
10 represent the employees?

11 A Well, of course, I try not to.

12 Q My point is, is that -- if you saw the women, and I don't
13 mean women in a negative way. If you saw the staff members
14 between the time the petition was withdrawn in 2014 and the
15 time -- and the organizing effort began in 2015; it would have
16 been when you were performing your duties on behalf of the
17 Teamsters Union?

18 A So at this moment I think that that, that may be fair to
19 say. I'm just searching my memory back looking for other
20 answers, but that may be fair to say.

21 Q So other than when you may have gone to Durham with a
22 business representative or gone by the facility -- well, I'll
23 just stick with what you said. Gone to the facility with a
24 business representative. Did you have contact with any of the
25 staff members eligible to vote in the May 8th election -- May

1 8th 2015 election between the time the petition was withdrawn
2 in 2014 and the time the organizing effort started in 2015?

3 A I'm must thinking about it for a while.

4 Q That's not a problem.

5 A Just thinking about it.

6 Q Sometimes it's hard to ask good questions.

7 MS. NISPEROS: Can we -- never mind. You're referring to
8 the time that the organizing started, which was the mid-March
9 or later period that Mr. Smith testified to; is that what
10 you're?

11 MR. GILBERT: Yes, ma'am.

12 THE WITNESS: So at this very -- at this very moment, I
13 don't really believe -- I don't believe so.

14 MR. GILBERT: Okay.

15 THE WITNESS: I don't believe so at this very moment. No.

16 Q BY MR. GILBERT: And do you recall when you did stop by
17 the facility with the business representative, whether or not
18 you talked to Ms. Dorton? That is during the period of time
19 when -- between when the petition was withdrawn and the
20 organizing effort started in March of 2015?

21 A So when I'm inside the facility I just wave at -- I'll
22 wave at them because they're at work and I don't want to, you
23 know, intervene or interject with what they're doing, so I just
24 wave at them.

25 Now, when I'm outside, I just -- you know, when we're

1 outside, that's a different story. So I've had interjections
2 with Adele -- I mean, different people. "Hey. How is
3 everything with," you know. Just chit chat or just small talk,
4 or for lack of a better words.

5 Q Understood. I guess I'm just -- I'm focusing on Michelle.

6 A Oh, okay.

7 Q So when you were there visiting with the business rep, did
8 you -- do you recall any specific conversations with Ms.
9 Dorton, whether it was inside or outside between the time the
10 petition was withdrawn in 2014 and the time the organizing
11 efforts started in March of 2015?

12 A Besides small talk?

13 Q Yes, sir.

14 A No. No.

15 Q Okay. Fair enough.

16 A That I can recall. No.

17 Q Fair enough. And I think I've asked this question --
18 I think you -- and I don't want to burden the record, but did
19 you recall any other specific conversations from the time the
20 organizing started in mid-March or a little bit later, 2015,
21 and the date of the election with Ms. Dorton regarding the
22 election?

23 MS. NISPEROS: I'm sorry, I believe that question's
24 already been answered.

25 MR. GILBERT: Well, I think he said he talked to a lot of

1 people and that -- so I'm trying to restrict it to Ms. Dorton
2 so that we can move, you know, get him off the stand.

3 HEARING OFFICER KAUFMAN: I don't recall whether that
4 specific question was asked, so I'm going to allow it.

5 MS. NISPEROS: Okay.

6 THE WITNESS: So, would you --

7 MR. GILBERT: Yes, sir.

8 Q BY MR. GILBERT: Again, the time frame is the middle of
9 March slash end of March 2015 when the organizing started up to
10 the day of the election. Do you recall any conversations with
11 Ms. Dorton other than -- either by phone, in person, other than
12 what you've described for me already, which was that -- and I'm
13 using the term speaker phone conversation just so you have a
14 term of reference. Do you recall any other phone calls or
15 conversations with Ms. Dorton in person one on one during that
16 period of time?

17 A Yeah. I've had phone calls.

18 Q Okay. And how many phone calls would you estimate that
19 you had with Ms. Dorton during that period of time?

20 A Phone calls? I want to say -- it's hard to keep track of
21 it.

22 Q I understand, and I'm not -- I mean, more than five?

23 A Let me think for a second. I would like to -- I feel
24 comfortable saying five to six -- four to six. I would feel
25 comfortable saying four to six communications. Excluding

1 Employer Exhibit 2, I would feel comfortable saying between
2 four and six, somewhere in that range.

3 Q Okay. And what --

4 A Oh, excuse me.

5 Q Yes, sir.

6 A Just for clarification. So once again, so when I say the
7 four to six phone calls, but you were asking me were they one
8 on one. Once again, I just don't know if they're one on one, I
9 don't know if I'm on speaker phone, I don't know what's going
10 on around when I'm not -- so I really don't know. But I just
11 wanted to clarify that.

12 Q Understood. To your knowledge, though, they were one on
13 one, but what you're saying is it's possible that they could --
14 somebody else could have been listening.

15 A Yeah.

16 Q Okay. And during those phone calls, did -- was the
17 company's indication that they could possibly challenge
18 Ms. Dorton's vote discussed?

19 MS. NISPEROS: Objection. Could I ask for a rephrase?

20 MR. GILBERT: Sure.

21 MS. NISPEROS: I feel like that's a difficult question.

22 Q BY MR. GILBERT: During those phone calls did you talk to
23 Ms. Dorton about the fact her vote may be challenged?

24 A No. So in regards to the challenge, that was, like, two
25 or three days before May the 8th. That's when I originally

1 first said it. It was, like, three days before the election.
2 So that was the first time I had even mentioned it. I had
3 known about it since on or about, like, April the 22nd. I
4 think that's when I -- on or about April the 22nd. I think
5 that's when I received the excelsior list under the new
6 guidelines. It had, you know, it had those individuals
7 separate. So --

8 Q So the first time that the Union, to your knowledge,
9 learned that the company may challenge Michelle Dorton was when
10 you received the excelsior list?

11 A Yes.

12 Q During the phone calls with Ms. Dorton, again, during that
13 period we've described, those four to six that you talked
14 about, did you ask Ms. Dorton to provide you with information
15 about how the other employees that were eligible to vote were
16 leaning?

17 A So -- so, no, because I don't try to get other people to
18 gauge things for me, you know. As you were aware that a
19 petition was withdrawn on or about 2014, whatever that was.
20 And so it's been my position -- I know I may not be answering
21 the question --

22 Q No, you are.

23 A -- I just want to get this -- but it's been my position
24 that if they would like to organize, if they're seeking
25 representation, I'm not a used-car salesman. They're going to

1 do what they want to do. So I don't try to solicit people to
2 do things. And this particular group -- and I'm not saying I'd
3 solicit any other time -- but in this particular group I didn't
4 do a whole lot. It was all up to them. I let them just do
5 whatever you want. If you guys want to have a meeting I make
6 myself available. I tell you the procedures and the
7 guidelines. And that's my function. I'm not a used-car
8 salesman.

9 Q Fair enough. Let me ask you this way, because maybe then
10 we can just streamline this. Do you recall any of the topics
11 that you've discussed with Ms. Dorton during those four to six
12 phone calls during that period of time, that is late to
13 mid-March 2015 to the date of the election?

14 A Yeah. Yeah. All elections are regulated by the National
15 Labor Relations Board. It's a secret ballot election. No one
16 will know how you voted unless you tell them. Don't put any
17 identifiable marks on the ballot or it's going to get voided.
18 I just talked about the procedures, you know. We talk about, a
19 lot of the ladies were concerned about their job. A lot of
20 ladies were concerned about being escorted off the job because
21 they call it a walk-out. No, not a walk-out. They call it
22 something, the escort. So they were concerned about being
23 escorted off the premises or terminated. They're at-will
24 employees, so some of the ladies were concerned about that. So
25 I talk about things like that, yes.

1 Q Okay. Anything else that you can specifically recall
2 talking about with Ms. Dorton as it relates to the election,
3 that is during that four to six phone calls that you had with
4 her during the period of time from March -- middle of March,
5 late March 2015 to the date of the election?

6 A I can't really recall. Only things that I really recall,
7 I mean the only things that I know that I did talk about is the
8 process of the election. Do they have any questions or
9 concerns in regards to anything. Feel free to give me a call.
10 Everyone has my number.

11 Q And that's all you can recall talking about with
12 Ms. Dorton, correct?

13 A From those four to six calls that I mentioned about?

14 Q Yes, sir.

15 A Maybe, how long is it going to take, and what if it
16 doesn't happen. Can we be terminated.

17 Q And I'm only asking what you recall.

18 A Yeah.

19 Q If you don't recall anything specific, that's fine.

20 A No, that's what I'm --

21 Q Okay. Fair enough.

22 A -- that's what I'm testifying to.

23 Q Yes, sir.

24 A And so pretty much the same things, can we be terminated,
25 what are they going to do, am I protected, what does -- well,

1 I'm not saying that she say it -- so I may be getting -- I
2 better slow down because I may be getting off-track thinking
3 about other conversations as well.

4 Q Okay.

5 A So that's all I can actually recall at this very moment.

6 Q Did you, sir, exchange any e-mails with Ms. Dorton during
7 the period of time that the organizing commenced in mid to late
8 March 2015 to the date of the election?

9 A Did I exchange any e-mails with her?

10 Q Yes, sir.

11 A So my answer is no, not that I recall. I didn't -- I
12 don't think I knew her e-mail address. So my answer at this
13 very moment is no. Not a hundred percent sure that it's no,
14 because I just don't recall it. So my answer is no because if
15 I had communicated with her through e-mails, counsel would have
16 that.

17 Q And I don't want to know about any conversations you've
18 had with your counsel. It's none of my --

19 A No, I'm talking -- I was referring to you.

20 Q Oh. So is it fair to say then that you've checked your
21 computer?

22 A So I've checked my phone. That's all -- my phone is my
23 computer.

24 Q And does your phone maintain and keep e-mails -- my phone
25 only keeps e-mails for, like, I don't know, four weeks or

1 something. But yours keeps it forever?

2 A No, no. Not forever. I think mine is capped off at a
3 certain amount, and then as they keep accumulating --

4 Q Correct. Yeah, right.

5 A -- then it seems like they disappear, so.

6 Q So in the period of time covered by the subpoena, though,
7 you checked your phone to see if you had any e-mails from
8 Ms. Dorton, correct?

9 A So, no. In actuality I didn't check for no e-mails
10 because I never did send any e-mails. The only communication
11 that I sent out was the text messages, the telephone calls, and
12 to send out a communication from our office. Oh, I had sent
13 out a mailer.

14 Q Okay. And is that something that's been produced?

15 A Has there --

16 MS. NISPEROS: If it's -- counsel represented that if it's
17 something responsive to the subpoena then it's been produced.

18 MR. GILBERT: Well, I can assure you that subpoena
19 requests any and all documentation exchanged between this
20 individual and Ms. Dorton or anybody else eligible to vote. So
21 I'm just -- I don't remember seeing a communication.

22 A So, oh, the communication was thank you for participating
23 in the election --

24 MS. NISPEROS: Your Honor, I'm sorry. Are we -- can we
25 clarify the period that you're --

1 MR. GILBERT: Yeah. During the -- and again, I could be
2 wrong. I just don't remember seeing any communication. But
3 I'm saying between March 2015 and May the 8th, 2015.

4 MS. NISPEROS: Right. And I'm saying that they're --
5 sorry.

6 MR. GILBERT: No. Why are you saying the witness has
7 testified the communication was sent?

8 MS. NISPEROS: Can we go off the record for a moment?

9 HEARING OFFICER KAUFMAN: Off the record.

10 (Off the record at 4:52 p.m.)

11 Q BY MR. GILBERT: Sir, the last thing I want to talk to you
12 about just briefly --

13 HEARING OFFICER KAUFMAN: We're not on the record yet.

14 THE COURT REPORTER: He's fine. He's fine.

15 HEARING OFFICER KAUFMAN: Okay.

16 MR. GILBERT: I was just practicing.

17 Q BY MR. GILBERT: The last thing I want to talk to you
18 about is the meeting that you conducted with the staff
19 employees relating to their organizational efforts in 2015. Is
20 that the meeting that took place at the sandwich shop?

21 A That is correct, yes.

22 Q And do you recall Ms. Dorton speaking at that meeting?

23 A Yes. Ms. Dorton, she spoke.

24 Q Did she address the other employees?

25 A So, I facilitated that meeting. So the meeting was at the

1 sandwich place, at the sandwich shop, a table like you guys,
2 you gentlemen are sitting at. I had to have it away --

3 MR. GILBERT: Let the record reflect it's a, I don't know,
4 two-foot by -- or three-foot by, I don't know, ten-foot table
5 or 12-foot table, I guess.

6 THE WITNESS: But they don't have those tables at Togo,
7 they're split in half. So they had to put four of the tables
8 together.

9 Q BY MR. GILBERT: Okay.

10 A So four -- some of the women were sitting on that side,
11 some women were sitting on the left side, the right side. I
12 was at the head of the table. Questions, concerns. I
13 introduced myself for the ones who don't remember me, X, Y and
14 Z. A lot of people spoke. Michelle, yes, to answer your
15 question, yes, she spoke as well.

16 Q Okay. And I guess I'm more concerned, or my question
17 really goes to, did she address the other employees or did she
18 just speak. You know, did she just comment as you guys were
19 discussing things?

20 A She commented. She commented. She may have even asked
21 questions. It was an open forum, so that was one of the main
22 objectives of the meeting, to ask your questions, get your
23 concerns out there. So I believe everyone at that meeting did
24 a lot of talking. But no one talked more than Rodney did.

25 Q Okay. That's you.

1 A Yes.

2 Q Okay.

3 A For the record. Rodney Smith.

4 MR. GILBERT: That's good. That doesn't enunciate, but
5 that's okay. I did that before. You get witnesses who do
6 this.

7 Q BY MR. GILBERT: Did -- just a couple more questions. Did
8 Michelle Dorton ever bring to you questions from the group,
9 meaning did she ever serve as a conduit kind of between the
10 group and you to make sure the questions were getting answered?
11 That is, the staff?

12 A No.

13 Q Okay. Did --

14 A Not that I recall. Let me just put that. Not that I
15 recall. I know -- so, I'm going to volunteer some --

16 MS. NISPEROS: Can I object? Can counsel clarify what you
17 mean by "conduit"?

18 MR. GILBERT: Sure.

19 Q BY MR. GILBERT: Well, do you understand what the term
20 conduit means?

21 A Why don't you just tell me, Geoff?

22 Q What's that?

23 A Tell me, Geoff.

24 Q Okay. No, and not -- look, it's -- I don't even know what
25 it means really. But I mean, just a -- did you ever ask her

361

1 to -- if the staff had questions, did you ever -- did she ever
2 bring those to you on their behalf? Did she ever say to you,
3 hey, Rodney, XYZ has ABC, XYZ has questions. Can you answer it
4 for me and I'll get you the -- I'll get them the answer?

5 A No.

6 Q Okay.

7 A I'm glad we did clarify that.

8 Q Okay. The -- did you ever ask Michelle Dorton to
9 disseminate information on behalf of the Union to eligible
10 voters with respect to the election that was -- or that took
11 place on May 8th, 2015?

12 A No.

13 Q Okay. And that includes both verbal and written
14 information. So did you ever say to Michelle, hey, Michelle, I
15 need -- I want the voters to know something. Can you take it
16 to them and tell them what I want them to know?

17 A Well, there is one instance I did that with about three
18 different people. I have to get a feel what the group -- how
19 does the group feel. So I had to send out a message to, like,
20 three or four different people to see -- and I think she was a
21 part of that.

22 Q So can you -- what was the message?

23 A So I want to know when and where would you like -- when
24 and where would you ladies like to meet. So they need to let
25 me know this type of stuff in advance so I can make myself

1 available for that. So that was -- I had to reach out to a
2 couple of them and, okay, what's the best time for you. Okay.
3 What time. So that's what I'm referring to.

4 Q So do you have text messages similar to the ones contained
5 in Employer Exhibit 2 with other staff members that were
6 eligible to vote in the May 8th, 2015, election?

7 A No, because if I did I would have already -- we would --
8 counsel would have it. I'm talking about Employer's counsel.

9 Q So how did you then communicate with the other -- because
10 you clearly texted with Michelle, I think you would agree with
11 me, about meeting locations and times. And if you didn't text
12 with the other ladies, how did you communicate -- how did you
13 ask them about that issue?

14 A Over the telephone.

15 Q Telephone. Now, after Steve -- and I forgot his last
16 name, I apologize.

17 A Steve Bender.

18 Q Bender, yes, sir. After he met with the employees on
19 April 21st, 2015, and took these notes that are reflected in
20 Employer's Exhibit 27, and you said you've seen these notes
21 before, correct?

22 A Yes.

23 MR. GILBERT: So I would move for the admission of
24 Employer's Exhibit 27.

25 MS. NISPEROS: No objection, although I would note that if

1 Employer intends to examine the witness, just foundation as to
2 knowledge.

3 HEARING OFFICER KAUFMAN: Okay. But no objection?

4 MS. NISPEROS: No objection.

5 HEARING OFFICER KAUFMAN: Okay. Employer Exhibit 27 is
6 received into the record.

7 (Employer Exhibit Number 27 Received into Evidence)

8 Q BY MR. GILBERT: Do you know when Mr. Bender -- do you
9 know when he takes the notes?

10 A So, on this particular one?

11 MS. NISPEROS: I'm sorry, can I -- does the witness have
12 Employer 27 in front of him?

13 MR. GILBERT: He should.

14 HEARING OFFICER KAUFMAN: Yes.

15 THE WITNESS: What was the question, sir?

16 Q BY MR. GILBERT: Do you know the process -- and you may
17 not know this, but do you know the process Mr. Bender follows
18 when he takes these types of notes?

19 A So I make an assumption, so I don't know factual because I
20 wasn't there. I could make an assumption.

21 Q Have you ever been with Mr. Bender when he takes notes?

22 A He's taken notes and I -- yeah. I've been in a room while
23 he's taking notes, that is correct.

24 Q And he's taking the notes contemporaneous with the meeting
25 that's going on?

1 A Yes.

2 Q Okay.

3 MS. NISPEROS: Can I -- can we go off the record for a
4 moment?

5 HEARING OFFICER KAUFMAN: Off the record.

6 (Off the record at 5:00 p.m.)

7 HEARING OFFICER KAUFMAN: Any further questions,
8 Mr. Gilbert?

9 MR. GILBERT: No, ma'am.

10 HEARING OFFICER KAUFMAN: Ms. Nisperos, are you going to
11 have any cross for Mr. Smith?

12 MS. NISPEROS: Let me take one minute. Okay. Just a
13 couple questions. It shouldn't take long.

14 Hearing Officer Kaufman: Okay.

15 Ms. Nisperos: Are we on the record?

16 Hearing Officer Kaufman: We are on the record.

17 MS. NISPEROS: Okay.

18 CROSS-EXAMINATION

19 Q BY MS. NISPEROS: Mr. Smith, you know me. I'm your
20 attorney I am going to ask you couple clarifying questions.
21 You testified that you had a meeting with the Durham employees
22 who are at issue in this matter, that you went to the
23 meeting -- I believe you said that you went to the meeting, put
24 the tables together and you had the meeting, and that you
25 introduced yourself. Did you -- how did you introduce

1 yourself? Did you say anything about who you were, that you
2 were with Teamsters, anything like that?

3 A Yes. So at this meeting, you know, it's a Togo, so I'm
4 waiting for some other ladies to come, but a couple ladies are
5 there. I get the lady who works at Togos, put every -- put
6 some tables together. So they put the tables together, little,
7 small tables so people sit on both sides. I stood at the front
8 of the table, I informed everyone on the record, Rodney Smith,
9 Teamsters 853, passed out my business cards to everyone. I had
10 on Teamster attire. I facilitated the meeting. Actually, I
11 ordered a sandwich and didn't even eat it because I did too
12 much talking. But anyway, yeah.

13 Q Okay. And while you were at that meeting, did you say
14 anything to the folks who attended to communicate that they
15 should vote for the Union or that something negative would
16 happen to them?

17 A No. No.

18 Q Okay.

19 A I wouldn't say that.

20 Q Did you threaten anyone with something -- some negative
21 consequence would happen with them if they didn't vote for the
22 Union?

23 A No.

24 Q Okay.

25 MS. NISPEROS: Those are my questions.

1 HEARING OFFICER KAUFMAN: Thank you. Please state and
2 spell your name for the record.

3 THE WITNESS: My name is Ronald, middle name is Humphrey,
4 and the last name is Mahler, M-A-H-L-E-R.

5 DIRECT EXAMINATION

6 Q BY MR. GILBERT: Good morning, Mr. Mahler. How are you,
7 sir?

8 A I'm good. How are you?

9 Q Doing well. Thank you. My name's Geoff Gilbert. I'm the
10 Employer's counsel. I'm going to be asking you some questions
11 today. If I ask a question that doesn't make sense or use a
12 term or a phrase that you're not familiar with, if you would
13 just ask me to repeat the question, that would be acceptable to
14 me. Is that okay with you?

15 A Yes, it is.

16 Q Sir, are you under the influence today of any type of
17 medication or other substance that would prevent you from
18 testifying truthfully today?

19 A No, I'm not.

20 Q Sir, can you please state for the record if you're
21 currently employed?

22 A Yes, I am.

23 Q Who are you employed by?

24 A Durham School Services.

25 Q And what's your current title, sir?

1 A General manager.

2 Q And how long have you been a general manager at Durham

3 School Services?

4 A Three years.

5 Q What location are you currently employed at as a general
6 manager?

7 A The Hayward Customer Service Center.

8 Q Prior to being employed at the Hayward Customer Service
9 Center as the general manager did you serve as a general
10 manager at any other Durham location?

11 A Yes.

12 Q What location, sir?

13 A Santa Clara.

14 Q And prior to -- well, let me just ask a more broad
15 question. How long have you been employed by Durham Services
16 in total?

17 A Five years.

18 Q And how long have you been in the transportation industry?

19 A Going on 46 years.

20 Q All in school bus?

21 A Yes.

22 Q Sir, are you familiar with the company's managerial
23 structure at the Hayward Customer Service Center?

24 A Yes, I am.

25 Q And, sir, who would be the highest ranking official at the

1 Hayward Customer Service Center?

2 A It would be myself.

3 Q And then the second level of management would be whom,
4 sir?

5 A It would be Sandra Wilson and Roxanne Liete (phonetic).

6 Q And can you identify for the record who Roxanne Liete is?

7 A Roxanne Liete is the site supervisor out in the Livermore
8 location.

9 Q And so we've had a little bit of testimony, but can you
10 just explain for the record the relationship between the
11 Livermore facility and the Hayward Customer Service Center?

12 A Certainly. Livermore and Hayward fall under the same
13 contract with the same school districts.

14 Q Is it fair to say one's a satellite of the other?

15 A Yes.

16 Q And which one would be the satellite?

17 A The Livermore location.

18 Q And, sir, we've had some testimony about a safety
19 supervisor. Can you identify that individual?

20 A Yes. That would be Eileen Noonan.

21 Q And would Ms. Noonan be on that same level with Ms. Wilson
22 and Ms. Liete?

23 A Yes.

24 Q And then is there anybody else on that level?

25 A Yes. There's one more.

1 Q Who?

2 A That would be Jeremy Escobar. He's the fleet maintenance
3 supervisor

4 Q Okay. And moving down, who's on the next level?

5 A That would be Michelle Dorton.

6 Q And what is Michelle Dorton's title?

7 A She's the lead dispatcher.

8 Q And, sir, the employees' personnel files, are they kept at
9 the Hayward Customer Service Center?

10 A Yes, they are.

11 Q And they're kept in the normal course of business?

12 A Yes, they are.

13 Q And do you have access to those personnel files?

14 A Yes, I do.

15 Q And did you review Ms. Dorton's personnel file prior to
16 coming here?

17 A No, I did not.

18 Q Not today --

19 A Not today.

20 Q -- but within the last week have you looked through
21 Ms. Dorton's personnel file?

22 A Yes, I have.

23 Q And if you look on the lectern up there, there's a
24 document that's been marked as Employer's Exhibit 1. Could you
25 try to find that, sir?

1 copies if you want.

2 MS. NISPEROS: That's fine.

3 MR. GILBERT: Whatever you want to do.

4 HEARING OFFICER KAUFMAN: I don't think that's necessary,
5 but --

6 MR. GILBERT: Okay. All right.

7 HEARING OFFICER KAUFMAN: Let's move on.

8 Q BY MR. GILBERT: So go ahead, sir, if you could read those
9 into the record.

10 A Sure. Ms. Comodo (phonetic) is at \$22.80 an hour.
11 Ms. Darlene Corley is at 17.05. Michelle Dorton is at \$20.36.
12 Ms. Adela Garcia is at 21.55. Ms. Sherry Head is at 21.61.
13 Ms. Shirley Myers is at 20.20. And Ms. Susan Robbins is at
14 22.41.

15 Q And, sir, are all those employees --

16 MS. NISPEROS: Can I just ask for another run through
17 again? I missed something here.

18 MR. GILBERT: Oh, sure.

19 THE WITNESS: Sure.

20 MS. NISPEROS: Thank you.

21 THE WITNESS: Ms. Candy Comodo is at 22.88. Ms. Darlene
22 Corley is at 17.05. Ms. Michelle Dorton is at 20.36.
23 Ms. Adela Garcia is at 21.55. Ms. Sherry Head is at 21.61.
24 Ms. Shirley Myers is at 20.20. And Ms. Susan Robbins is at
25 22.41.

1 Mahler. When I mean a number, there's a number, of requests
2 for time off slips. Do you see those? And especially there's
3 one, Employer's Exhibit '3, which is a blank copy, just the
4 actual sheet itself.

5 A Yeah.

6 Q Thank you. Yep. Sir, are you familiar with those forms?

7 A Yes, I am.

8 Q And how are you familiar with those forms?

9 A I've worked with these forms now for the past five years.

10 Q And, sir, who at the facility is authorized to accept
11 request for time off forms?

12 A It would be Sandra Wilson, the operations supervisor,
13 myself as the general manager, and Michelle Dorton as the lead
14 dispatcher.

15 Q And, sir, who is authorized to approve requests for time
16 off forms?

17 A Myself as general manager, Sandra Wilson as operations
18 supervisor, and Michelle Dorton as lead dispatcher.

19 Q And, sir, what protocol do you follow if a request for
20 time off is presented to you? What do you do if you got a
21 request for time off?

22 A The first thing I do is I go to the lead dispatcher,
23 Michelle, because I need to find out if the route can be
24 covered or not.

25 Q And assuming that Ms. Dorton tells you the route can be

1 A It would indicate to me that it was denied.

2 Q And, sir, if you could take some time to look through the
3 request for time off forms that are in front of you, and --

4 MS. NISPEROS: I'm sorry. Can we have that reference to
5 the exhibit? Is that what you're asking him to look at?

6 Q BY MR. GILBERT: Let's start with Exhibit 21, which
7 contains 21 packets of information. And I think you've already
8 testified to this, sir. Maybe we can streamline this.

9 Sir, have you ever approved a request for time off form
10 that does not contain your signature?

11 A No, absolutely not.

12 Q So if there's a request for time off form that does not
13 contain your signature, is it fair to say that you did not
14 approve that request for time off form?

15 A That is correct.

16 Q And, sir, the Employer maintains an employee handbook;
17 correct?

18 A Yes, we do.

19 Q And it has in the employee handbook an attendance policy;
20 correct?

21 A Yes.

22 Q And, for example, when you were general manager of the
23 Santa Clara Customer Service Center, you applied that
24 attendance policy; correct?

25 A Yes, I did.

1 MR. GILBERT: I would move for the admission of Employer
2 Exhibit 28.

3 HEARING OFFICER KAUFFMAN: Counsel, any objection?

4 MS. NISPEROS: I object on relevance. This isn't
5 probative or relevant to Ms. Thornton's job duties, 211 status,
6 coercion issues at issue in this matter.

7 HEARING OFFICER KAUFFMAN: Okay. My position is that it
8 has some arguable relevance, so I'm going to go ahead and admit
9 it. Employer Exhibit 28 is received into the record.

10 (Employer Exhibit Number 28 Received into Evidence)

11 Q BY MR. GILBERT: Sir, are you aware of whether or not the
12 drivers at your facility are represented by the Teamsters
13 Union?

14 A Yes, I am.

15 Q And is -- who is -- you stated that Ms. Alvelais was a
16 Union representative; is that right?

17 A Yes, she is.

18 Q Is she responsible for administering the contract at term
19 on behalf of the Union?

20 A Yes, she is.

21 Q And I hand you what's been marked as Employer's Exhibit
22 29. Is that a copy of the current collective bargaining
23 agreement that governs the terms and conditions of Durham's
24 drivers at its Hayward Customer Service Center?

25 A Yes, it.

1 A If -- if --

2 Q Go ahead.

3 A She did say something about getting your supervisor under
4 control.

5 Q Did she threaten to fine you?

6 A Oh, yes, yes.

7 Q Sir, at any time has Ms. Dorton ever come to you and asked
8 for additional compensation?

9 A Yes, she did.

10 Q And what was the basis for her request for additional
11 compensation?

12 A She told me because she supervised the people in dispatch,
13 she felt she deserved more money.

14 Q And at that time did you ask her to put that in writing?

15 A Yes, I did.

16 Q And at any time thereafter, did Ms. Dorton put it in
17 writing to you?

18 A No, she has not.

19 Q Sir, do you recall an incident involving Ms. Moncado
20 (phonetic) and Ms. Dorton?

21 A Yes, I do.

22 Q Sir, I'm handing you what's been marked as Employer
23 Exhibit 31. Can you identify that document?

24 A Yes. It's an incident report that a driver, Paula
25 Moncado, wrote up after she had a run-in with Ms. Dorton.

1 MR. GILBERT: I would move for the admission of Employer
2 Exhibit 31.

3 HEARING OFFICER KAUFMAN: Counsel, any objection?

4 MS. NISPEROS: Just a second. I object. This is
5 irrelevant to the issues in this matter. It's not probative of
6 her supervisory status.

7 HEARING OFFICER KAUFMAN: Well, Ms. Moncado testified
8 about this anyway. And I asked counsel to provide this. So I
9 think it tends to be relevant, and I'm going to overrule the
10 objection. Employer 31 is received into evidence.

11 (Employer Exhibit Number 31 Received into Evidence)

12 Q BY MR. GILBERT: Sir, if you review the front page of
13 Employer's Exhibit 31, at the top do you see where it says date
14 occurred?

15 A Yes, I do.

16 Q And what date did it say that it -- indicate that this
17 occurred?

18 A April the 22nd of 2015.

19 Q And, sir, what time does it say that this occurred?

20 A 2:40 in the afternoon.

21 MR. GILBERT: And, Madam Hearing Officer, I would ask that
22 the hearing officer take administrative notice that the --
23 under the new guidelines, rules, that the NLRB has established,
24 that the Employer's voter eligibility list was submitted to
25 both the Union and to the NLRB on April 22nd 2015 at

1 approximately 11:53.

2 HEARING OFFICER KAUFMAN: Okay. Counsel, do you agree to
3 that representation? Obviously I don't -- I don't have the
4 list in front of me, but it should be something that the two of
5 you could easily agree on.

6 MS. NISPEROS: What was the date and time again?

7 MR. GILBERT: We can show it to you. We have --

8 MS. NISPEROS: The date --

9 MR. GILBERT: -- the receipt.

10 MS. NISPEROS: What -- I need to --

11 MR. GILBERT: I'm going to show it to you.

12 MS. NISPEROS: I'm asking -- but I'm asking you to repeat
13 the information that you gave, that it was --

14 MR. GILBERT: April -- I believe April 22nd, 11:53 p.m.

15 MR. KPERE-DAIBO: 11:53 p.m.

16 MR. GILBERT: Of a.m., yeah, a.m.

17 HEARING OFFICER KAUFMAN: A.m.

18 MR. GILBERT: A.m.

19 MS. NISPEROS: 11:53 a.m. I don't know what time it was
20 served on the Union. I see the certificate of filing with the
21 NLRB.

22 MR. GILBERT: That's fine.

23 MS. NISPEROS: I wouldn't disagree with that, but I can't
24 at this moment say what time it was served on the Union for a
25 date. I would need to check.

1 MR. GILBERT: It was -- the date of administrative notice
2 that it was served on the NLRB on 4/22/2015.

3 HEARING OFFICER KAUFMAN: Yes. I can administrative
4 notice of that. And if necessary, we can get that document
5 into the record. I'm sure we have a certificate of service --

6 MR. GILBERT: Right.

7 HEARING OFFICER KAUFMAN: -- for the Union.

8 MR. GILBERT: And that the rules -- I think the new rules
9 now require the -- to serve on the Union as well --

10 HEARING OFFICER KAUFMAN: Okay.

11 MR. GILBERT: -- directly as opposed to the old
12 methodology which was just to submit to the NLRB.

13 HEARING OFFICER KAUFMAN: Okay. And, Ms. Nisperos, if you
14 -- if you could confer with your client and confirm. So that
15 will just save us some time if we could just stipulate to the
16 time --

17 MS. NISPEROS: Sure.

18 HEARING OFFICER KAUFMAN: -- that the Union received --

19 MS. NISPEROS: Yeah.

20 HEARING OFFICER KAUFMAN: -- the Excelsior List.

21 MS. NISPEROS: I'll check it. Just --

22 HEARING OFFICER KAUFMAN: Okay.

23 MS. NISPEROS: -- again --

24 HEARING OFFICER KAUFMAN: Thank you.

25 MS. NISPEROS: -- I'm not disputing that it was --

1 Employer's Exhibit 22? Is that a copy of a notation that was
2 found in the banker's box?

3 A Yes, yes, it is.

4 MR. GILBERT: And I would move for the admission of
5 Employer's Exhibit 22.

6 HEARING OFFICER KAUFMAN: Counsel, any objection?

7 MS. NISPEROS: I apologize. I haven't located Employer
8 22 --

9 MR. GILBERT: Here, I can --

10 MS. NISPEROS: -- to review.

11 MR. GILBERT: Here.

12 MS. NISPEROS: I object based on relevance and hearsay.
13 Counsel?

14 HEARING OFFICER KAUFMAN: I --

15 MR. GILBERT: I would respond that it's a business record
16 as far as the hearsay says. As far as the relevance goes, it's
17 already been testified to that Ms. Dorton signed the document.
18 The document clearly, again which was -- well, the document
19 clearly requests time off, and Ms. Dorton signed it. So it's
20 clearly relevant to the issues at hand.

21 HEARING OFFICER KAUFMAN: I'm going to admit it into
22 evidence. Employer Exhibit 22 is received into the record.

23 (Employer Exhibit Number 22 Received into Evidence)

24 Q BY MR. GILBERT: And, sir, just so the record is clear, do
25 you know who Ms. Maria Lopez is?

411

1 Q Did -- where did you -- where did you search for
2 additional time-off -- or requests for time-off slips?

3 A I went back to the same location, the counter, where
4 Michelle pointed to the first box.

5 Q And sir, if you look at Employer's Exhibit 11, which I
6 will just show you right here, do you see the counter space
7 there below the kind of bar area?

8 A Yes.

9 Q Is that the space that you looked at?

10 A Yes.

11 Q And sir, did you -- were you able to locate, at that time,
12 any additional requests for time-off slips?

13 A Yes, I did.

14 Q Okay. Sir, and I think if you look up on your lectern
15 there, there should be Exhibit ER4. I'm going off memory, but
16 I believe that's right.

17 A I have it.

18 Q Can you review those? Are those the requests for time-off
19 slips, sir, that you found located on the shelving unit below
20 the counter depicted in Ex 11?

21 A Yes, it is.

22 Q And sir, what is you -- what is different about those
23 requests for time-off forms than the ones that were -- that
24 were produced by Ms. Dorton?

25 A These all have Michelle's signature on the approval line.

1 Q Sir, are you familiar with Ms. Dorton's job
2 responsibilities?

3 A Yes, I am.

4 Q And let me move back one, I just recalled something, one
5 step here. We talked about Ms. Dorton's ability or authority
6 to authorize time off, correct?

7 A That is correct.

8 Q Do you -- can you give the hearing officer -- or can you
9 state, for the record, any specific examples where you're aware
10 that Ms. Dorton granted time off?

11 A Yes.

12 Q Do you recall the employee that was involved?

13 A Yes. I had a driver that got into an accident Wednesday
14 night on the way home and Thursday morning I wanted to talk to
15 that driver and get the driver's side of the story.

16 Q And sir, let me just stop you here, because in this type
17 of hearing, if you say, you know, Wednesday night or Thursday
18 morning, someone may assume that was this Wednesday or
19 Thursday. So I just -- just clarify, for the record. Are you
20 talking about on a Wednesday or are you talking about this
21 week?

22 A No. A Wednesday.

23 Q Okay. Continue.

24 A And so Thursday morning, I went to Sandra, the operations
25 supervisor, Sandra Wilson, and asked her where this driver was,

1 A Sure. The dispatcher's responsibility is to coordinate
2 the activity between drivers and to supervise the drivers, if
3 you will, to make sure that they get out of the yard in time;
4 that the kids get picked up and brought to school safely and on
5 time, and the same thing, that they're brought home safely and
6 on time, and also, to make sure that all the routes are covered
7 should a driver call in sick or if a driver requests time off,
8 it's the dispatcher's responsibility to make sure that those
9 routes are covered.

10 Q And in your organization, as the lead dispatcher, does
11 Michelle Dorton have more responsibility for those types of
12 functions than Adela Garcia?

13 A Oh, absolutely. Yes.

14 Q And so, sir, can you tell us, in the covering of routes,
15 what kind of discretion would be used by a dispatcher?

16 A It -- the dispatcher, especially the lead dispatcher, they
17 need to know all of the routes. They need to know, is there a
18 severely disabled child on there? Is a medically -- is there a
19 medically fragile child on that route, in order to cover that
20 route and to make sure that that routes gets from point A to
21 point B. So that -- that person needs to know everything about
22 those routes and everything that -- about those routes. I
23 mean, they need to know everything.

24 Q And --

25 A It's very important.

1 Q And in covering routes, what kind of factors would
2 dispatchers look at to -- in deciding, you know, where to
3 reassign a particular driver to cover a route?

4 MS. NISPEROS: Objection; leading.

5 MR. GILBERT: Well, I asked just what the factors were. I
6 didn't say -- I didn't say is -- is blank a factor. I said,
7 what are the factors?

8 HEARING OFFICER KAUFMAN: Mr. Mahler, do you know what the
9 factors are that a dispatcher would rely on?

10 THE WITNESS: Sure. They have to rely on the computer
11 program, Versatrans; they would have to rely on the route
12 sheets; they would have to rely on their personal knowledge
13 about the routes and the drivers and the schools.

14 Q BY MR. GILBERT: Are some schools -- are some school
15 districts more lenient with respect to kids getting home late?

16 A No.

17 Q No?

18 A No.

19 Q None at all, huh? All right. Okay.

20 What's the responsibility of a dispatcher with respect to
21 a bus breaking down?

22 A The dispatcher's responsibility is the safety of those
23 children. The first thing she needs to do is make -- or he/she
24 needs to make sure that those kids are off of that bus and on
25 their way home or to school.

1 Q And what would a dispatcher do to make sure that that
2 happens?

3 A Get a hold of another driver and get another bus out there
4 right away.

5 Q And just, I -- and what factors would they use to
6 determine what drivers to use to pick up those kids on a
7 broken-down bus, if you know?

8 A If -- if -- yeah, sure. Is it a wheelchair bus? Is it an
9 ambulatory bus? That makes a big difference. If it's an -- if
10 it's a wheelchair bus and the only drivers you have that are
11 available are ambulatory drivers, you can't do it. So the
12 drivers have to be qualified and they have to be trained on
13 that particular bus.

14 Q Is -- and I'm almost done here, but, sir, the process to
15 cover a route, how involved is that process?

16 MS. NISPEROS: Objection; foundation, personal knowledge.

17 Q BY MR. GILBERT: Okay. Sir, in your 40 plus years of
18 experience, including working for the school district and
19 Durham School Services for over 40 years in the transportation
20 industry, are you familiar with the process that is used to
21 cover routes?

22 A Yes.

23 HEARING OFFICER KAUFMAN: Okay. Yes. Go ahead.

24 Q BY MR. GILBERT: And could you just -- just describe what
25 you would -- what -- what a dispatcher goes through to try to

1 cover a route.

2 A Well, they've got to find out how many children there are,
3 what school they need to go to and what type of children are on
4 that bus, and who they have available.

5 Q And when you're looking at who is available, are you also
6 looking at proximity to the location that needs to be covered?

7 A Yes, absolutely.

8 Q Anything else --

9 A Yeah, the closest.

10 Q Anything else that you can think of that -- as far as
11 factors that would be considered by a dispatcher in determining
12 how to cover a route?

13 A Depending on how much time you have, okay? I mean, if you
14 need to do it right away, of course, you want to try to get the
15 closest driver, but if you've got some time and it's extra
16 time, of course, you want to go by the seniority list.

17 Q Have you ever had any complaints that Ms. Dorton hasn't
18 followed the seniority list?

19 A Yes.

20 Q Do you recall, were those complaints brought to you by the
21 Union?

22 A I can't recall.

23 Q Did you speak with Ms. Dorton about that?

24 A Yes.

25 MR. GILBERT: If I could have two minutes with my client?

1 HEARING OFFICER KAUFMAN: Yeah. And I'm going to ask
2 Mr. Mahler a couple of questions really quick.

3 MR. GILBERT: Sure. Absolutely.

4 HEARING OFFICER KAUFMAN: Mr. Mahler, when Ms. Dorton
5 approves time-off requests, does she consult with anybody
6 before she makes that decision?

7 THE WITNESS: No.

8 HEARING OFFICER KAUFMAN: And do you know if employee
9 requests for time off are ever approved without the form being
10 signed by anyone?

11 THE WITNESS: I would have to say, yes, absolutely.

12 HEARING OFFICER KAUFMAN: And do you know why that happens
13 or under what circumstances that happens?

14 THE WITNESS: Because the -- because nobody brought it to
15 my -- to either myself or to Sandra Wilson, the operations
16 supervisor.

17 HEARING OFFICER KAUFMAN: So is Dorton authorized to sign
18 requests for time off?

19 THE WITNESS: Yes, she is.

20 HEARING OFFICER KAUFMAN: Was she ever told not to sign
21 requests for time-off forms?

22 THE WITNESS: No. No.

23 HEARING OFFICER KAUFMAN: Okay.

24 Q BY MR. GILBERT: So, sir, were you the general manager
25 when Ms. Halsey (phonetic) was the general manager, too, of the

1 trying to meet the needs of a special -- a special-needs child?

2 A Mainly, to make sure that we have all of the equipment
3 that we need to service that child.

4 Q And in order to -- in order to comply with these legal
5 requirements, you have -- you need to make judgments about
6 which drivers will be -- are available that can meet that need,
7 correct? Or you have certain drivers or busses or equipment
8 that you need to have available to meet these special needs,
9 right?

10 A Again, it's broken down, really, into two groups whether
11 they're wheelchair drivers or not.

12 Q And can you explain the distinction between a wheelchair
13 drivers and non-wheelchair drivers, for the hearing officer's
14 benefit?

15 A Sure. A wheelchair driver is a driver that has been
16 trained to properly load, strap down and unload a wheelchair in
17 a bus.

18 Q Is there any other training that a wheelchair driver is
19 required to have in order to be a wheelchair driver?

20 A That's it.

21 Q Okay. And what, then, is a non-wheelchair -- wheelchair
22 driver?

23 A A driver that has not been trained to load, strap down and
24 unload a wheelchair.

25 Q Okay. And it's fair to say, then, that if someone in

1 dispatch is -- is looking for a driver who needs to pick up a
2 special-needs kid, their resources in terms of finding a driver
3 to pick up that kid is restricted by the training of the
4 driver, the equipment that's available for that special-needs
5 child and other things; that's fair to say, right?

6 A We have to have all of those in order to do it, yes.

7 Q You testified earlier that, in response to the Employer's
8 attorney's questions that one of the factors that someone would
9 consider when they're getting a route covered is the amount of
10 time available; do you recall talking about that?

11 A Time available to?

12 Q Amount of time they have to cover a route or to find an
13 available driver?

14 A Yes, that has to be taken in. Yes.

15 Q Okay. Can you elaborate on that and explain to the
16 hearing officer how -- how time is a factor in restricting what
17 dispatch does?

18 A Sure. If a route needs to be covered, it all depends on
19 what you're talking about. If you're talking about a route in
20 the morning, or if you're talking about a route in the midday
21 that needs to be covered, there is a big difference, okay? If
22 we need to cover a route tomorrow morning, we get a driver to
23 cover that route tomorrow morning. If it's a midday route and
24 you have to cover it on the fly, then, yes, you are restricted.

25 Q Thank you. I may have some follow-up questions for you.

1 A Sure.

2 Q And when you say midday routes, what are you referring to,
3 for the hearing officer's benefit?

4 A We have routes that run in the morning and in the
5 afternoon. A midday could be a special child that may go to a
6 daycare or a special class in the middle of the day and so it's
7 called a midday route.

8 Q Is the midday route the same as a p.m. route?

9 A In what sense?

10 Q Is there something -- is there -- is there a route called
11 a p.m. route or an afternoon route?

12 A Yes.

13 Q Okay. And so you said that if you have to -- you used the
14 phrase "on the fly," and you said that if you have to do that
15 on the fly, then, yes, you're restricted. Can you say more
16 about that of this -- what creates an on-the-fly need and how
17 dispatch would be restricted?

18 A Sure. If you have to cover a route all of the sudden at
19 the last minute because a driver goes home sick after their
20 a.m. route, you cover that route based on the drivers that you
21 have available, because a lot of them may be on a route
22 already. There's quite a few midday routes.

23 Q You would agree, then, that someone covering one of these
24 midday or afternoon routes is under a lot of time pressure to
25 cover a route that comes up -- that needs coverage on the fly,

1 correct?

2 A It depends on when it happens.

3 Q Can you elaborate for the hearing officer?

4 A Well, sure. If you need to cover a route that starts at
5 12 noon, and you're -- and you just find out five minutes until
6 12, yeah, everybody is under pressure, but if you find out at
7 8:00 that a route needs to be covered at 12 noon, you've got
8 plenty of time.

9 Q And you did testify, though, that this is -- this on-the-
10 fly kind of time constraint, this is more of a factor and more
11 of a restriction in the afternoon routes, correct?

12 A Explain that, please.

13 Q You referenced in terms of the midday routes that dispatch
14 would be restricted and have to make on-the-fly coverage, or
15 find coverage on the fly, correct?

16 A Uh-huh. Yes.

17 Q And that's -- that's even more so --

18 A Yes.

19 Q -- in the afternoon than in the a.m., correct?

20 A A midday is a midday. You're talking about three
21 different routes. Usually the routes that need to be covered
22 are a.m. or middays. The p.m. is pretty good.

23 Q Say that, again.

24 A Usually the routes that need to be covered --

25 Q Uh-huh.

1 A -- are usually in the morning or middays. The afternoons
2 are pretty good.

3 Q So you would agree that if -- if dispatch is covering a
4 midday route, they're going to have more of -- they're going to
5 have to make more of these on the -- again, more of this
6 coverage in these on-the-fly circumstances, more so than the
7 a.m. routes?

8 A And again, you know, it all depends on when the call comes
9 in.

10 Q And so you would agree that on midday routes when a --
11 when someone in dispatch has to cover a route, their
12 discretion, then, if limited when they're making -- when
13 they're covering in these on-the-fly circumstances, it's
14 limited by time?

15 A Ma'am, it all depends on the -- on the route, you know?

16 Q Okay. Just a few more questions, Mr. Mahler. Thank you
17 for your patience.

18 A You're welcome.

19 Q So you -- you saw the CBA that was put into evidence by
20 the Employer, right? And you're --

21 A Yes, I did.

22 Q And you're familiar with that?

23 A Yes.

24 Q Okay. Isn't it true that the routes that regular drivers
25 are assigned to -- well, that they drive, are bid on by the

1 drivers at the beginning of each school year?

2 A Yes, they are.

3 Q And they're bid by seniority, correct?

4 A Yes, they are.

5 Q And that's pursuant to the CBA that's currently in effect
6 between 853 and Durham as to the drivers, correct?

7 A Yes, ma'am.

8 Q Okay. Now, you also testified to Michelle Dorton's job
9 duties. Isn't it fair to say that Michelle Dorton is a very
10 experienced dispatcher?

11 A Yes, she is.

12 Q And it's also fair to say, then, that she relies on her
13 experience as a dispatcher in order to execute her job duties,
14 correct?

15 A Yes.

16 Q Now, you also testified that one of the factors that would
17 be used to cover a route is who is available in proximity and
18 who is the closest, can you elaborate for the benefit of the
19 hearing officer? Just explain what you meant a little more.

20 A Are you talking about a midday or are you talking about an
21 a.m., are you talking about -- I mean, there's a lot of factors
22 that come in. You know, did somebody call off the night
23 before? Is that what we're talking about?

24 Q So I'm talking about -- I just want you to initially
25 explain to the hearing officer what you meant when you said

1 that in terms of the process of covering a route, a dispatcher
2 will factor in who is available and proximity. What did you
3 mean by that?

4 A Well, and again, it depends on what route needs to be
5 covered. If you've got a midday that needs to be covered or
6 you have some kids that need to be picked up, some students
7 that need to be picked up at a school because they were missed
8 by another driver, absolutely, you're going to get the closest
9 driver to get those children picked up.

10 Q And this might be clear, but it may not be, can you
11 explain what you mean by the closest driver?

12 A Sure. If it's -- if it's in the middle of a route, if a
13 child is missed --

14 Q Sure.

15 A -- okay, and we need to get that child picked up as
16 quickly as possible --

17 Q Uh-huh.

18 A -- to get that child to school, we're going to try to find
19 the driver that's closest to that pick-up point to get them to
20 school.

21 Q Okay. So you're testifying that you would look to the
22 driver who is closest in distance and proximity to the route
23 where the kid needs to be picked up, or that need for coverage
24 exists, right?

25 A Right.

1 Q Okay.

2 A And -- and -- can I -- can I go ahead?

3 Q Yes, please.

4 A Sure. So usually what the -- what the dispatchers will do
5 is they'll also make an announcement on the radio saying, hey,
6 I've got this child that needs to be picked up. Can anybody
7 help? In hopes of the closest driver calling in and saying,
8 look, I can go pick up that child and get that child to school.

9 Q I'm sorry. What was the last part? I didn't quite hear.

10 A The dispatchers will get on the radio and they will say, I
11 have a child that lives on First Street that needs to get to
12 Tennyson School; I need the closest drive to pick up that
13 child.

14 Q And when this call -- this call that you're describing,
15 this is a general call out that a -- that dispatch would make
16 over a radio that goes -- does it go out to all of the drivers?

17 A Yes, ma'am.

18 Q Okay. So just so I'm clear. A kid needs to be picked up
19 at 12:15; we find out at 12:10, the driver's bus broke down.
20 That driver whose bus broke down would then call in to dispatch
21 and say, I can't pick up the kid at 12:15, right? Is that how
22 it would go?

23 A Yes.

24 Q Okay. And then the dispatch office would put out a call
25 understanding that time is of the essence, that they need to

1 get this route covered; if it's a special-needs child, for
2 example, they need to get it covered quickly; they -- that's a
3 restriction on their discretion, because if you need to get the
4 kid picked up, you need to get the kid picked up, correct?

5 A That's correct.

6 Q And if it's a special-needs kid where they have special
7 equipment requirements for being transported pursuant to their
8 IEP and legal requirements which Durham complies with, that's
9 another restriction put on their discretion, correct?

10 A Yes.

11 Q And I understand that there's lots going on; it's going to
12 depend on the situation, but depending on where the kid needs
13 to be picked up and what other drivers are available in the
14 area, their discretion is also going to be restricted by what
15 drivers are available and how close they are to the 12:15 kid
16 that needs to be picked up, right?

17 A That's correct.

18 Q Okay. Now, you mentioned something about -- you testified
19 about, in addition to the process of covering a route and
20 factors that are considered, you talked about the seniority
21 list. Can you explain to the hearing officer what you meant?

22 MR. GILBERT: Objection; vague.

23 Q BY MS. NISPEROS: Do you remember testifying about the
24 seniority list?

25 A Yes, I do.

1 Q What were you referring to in regard to covering routes?

2 A If -- if we have advance notice of a driver being off,
3 okay, depending on what it is, if it -- if it has to do with
4 extra work, extra time, extra money, then we have to follow the
5 seniority list.

6 Q And I imagine that this is the case, but I will just ask
7 so that it's clear, Durham, including the folks in the dispatch
8 office, are -- and someone who is assigning -- or excuse me.
9 In terms of getting drivers extra work, folks in the dispatch
10 office, as employees of Durham, they're required to follow the
11 CBA?

12 A Yes, they are.

13 Q Okay. And so you would make all of your dispatchers and
14 routers and others aware that there is a seniority requirement
15 and Durham has to follow it, correct?

16 A They know it.

17 Q Okay. And is there any other way -- can you explain to
18 the hearing officer, the other ways in which the seniority list
19 relates to routes?

20 A Mainly, for route bidding and extra time.

21 Q So then it's fair to say -- it's fair to say, then, that a
22 dispatcher's job duties are restricted by the requirements of
23 the collective bargaining agreement?

24 A Depending on -- depending on the situation.

25 Q Okay. You also gave some testimony about the other

1 employees in the Durham, it's the Hayward Customer Service
2 Center; is that how you referred to it?

3 A Yes, ma'am.

4 Q Okay. And you -- you mentioned a couple of names. Are
5 you -- you have the authority to hire and fire the folks in the
6 Hayward Customer Service Center, correct?

7 A Yeah. Yes.

8 Q And you also have the authority to set their schedules?

9 A Yes.

10 Q Okay. And you have the authority to transfer those
11 employees, correct?

12 A Not completely.

13 Q Can you elaborate?

14 MR. GILBERT: We will stipulate, if it helps the process.
15 Again, I -- Mr. Mahler is a Section 211 supervisor. I don't
16 know if that's where you're going, but --

17 MS. NISPEROS: That's fine. I'll stipulate to that.

18 HEARING OFFICER KAUFMAN: Okay. Stipulation accepted.

19 Q BY MS. NISPEROS: And you have the -- so you have the
20 authority to hire, fire employees in the Durham Customer
21 Service Center in Hayward, you can give them assignments,
22 correct?

23 A Yes, I can.

24 Q And you can tell them the way that they should go about
25 completing assignments, and you can direct their work in that

1 way, correct?

2 A Yes.

3 Q And you referenced routers earlier in your testimony; do
4 you recall testifying about routers?

5 A Yes.

6 Q And their job duties?

7 A Yes.

8 Q Okay. Isn't it fair to say that the routers are the ones
9 who create the routes that Durham drivers will run during the
10 academic year?

11 A Yes.

12 Q Can you explain to the Hearing Officer what their process
13 is?

14 A They gather the information from the school districts on
15 all of the students and what schools they go to, and based on
16 that, the routes are built.

17 MS. NISPEROS: I believe I'm done. I'm just going to take
18 a moment. Okay. No further questions.

19 HEARING OFFICER KAUFMAN: Okay. Any redirect?

20 REDIRECT EXAMINATION

21 Q BY MR. GILBERT: Mr. Mahler, do you recall counsel was
22 asking you about your ability to assign and direct work?

23 A Yes.

24 Q And sir, does Michelle Dorton have the ability to assign
25 and direct work?

1 A Yes, she does.

2 Q And does -- to your knowledge, does Ms. Dorton exercise
3 her authority to assign and direct work?

4 A Yes, she does.

5 Q Sir, if you would, turn to page 23 of ER 29, please.

6 A I'm sorry. What page?

7 Q Page 23, sir.

8 A I have it.

9 Q I'm only drawing your attention to this because there's
10 been some testimony, and I just want to make sure the record is
11 clear. Can you -- what is a -- in the transportation industry,
12 which you've been in for 40 years, the school-bus industry,
13 what's a guarantee? What does that mean?

14 A Those -- regardless of the amount of hours that you may
15 work under the guarantee, you're going to get the guarantee.

16 Q What does the guarantee at Durham School Services, Hayward
17 Customer Service Center for drivers?

18 A Five and a half hours.

19 Q And is that for cover drivers or is that all drivers?

20 A That does not include the cover drivers.

21 Q If you look at page 23, and I -- okay. I see it. Thank
22 you. Okay.

23 And sir, if you look at page 24, do you see section 5
24 there?

25 A Yes.

1 MS. NISPEROS: Objection; leading.

2 MR. GILBERT: Can I -- I mean, I'm examining the witness
3 as a 611(c). I seek permission to examine the witness as a
4 611(c).

5 MS. NISPEROS: The Union opposes that motion.

6 HEARING OFFICER KAUFMAN: Maybe just a couple foundational
7 questions to establish his adverse interests, and then --

8 Q BY MR. GILBERT: Sir, are you -- were you involved in the
9 organizing effort with respect to the staff employees that
10 culminated in the May 8, 2015, election at Durham School
11 Services?

12 A Can you repeat that?

13 Q Were you involved in the organizing effort on behalf of
14 the Union, as its agent, with respect to --

15 MS. NISPEROS: Again, objection; leading, and the --

16 HEARING OFFICER KAUFMAN: Well, he's just -- right now,
17 he's just trying to -- I've asked him to give me a little
18 foundation to determine whether I can grant his request for
19 611(c), so I'm going to give him some leeway.

20 Q BY MR. GILBERT: Sir, what's your title?

21 A It's union organizer for Teamsters 853.

22 Q Union organizer. And as the union organizer, you're the
23 agent -- you're an agent of the Union, correct?

24 A Yes.

25 Q Okay. And you speak on behalf of the Union, right?

1 A Yes.

2 Q You act on behalf of the Union, right?

3 A Yes.

4 Q And sir, as union organizer, were you involved in the --
5 in the organizing effort that culminated in the election at
6 Durham School Services on May 8, 2015?

7 A I attended the April 30th meeting only.

8 Q So if -- do you work along with Mr. Smith?

9 A Yes.

10 Q So if Mr. Smith testified that you were equally involved
11 in this organizing, he wouldn't -- he'd be lying?

12 MS. NISPEROS: Objection, leading again. It's calling for
13 a conclusion that Mr. Smith is lying. His testimony -- Mr.
14 Smith's testimony should speak for itself.

15 MR. GILBERT: Okay. Well, it's inconsistent.

16 HEARING OFFICER KAUFMAN: Go ahead and rephrase the
17 question, please.

18 Q BY MR. GILBERT: Is it -- sir, how much -- if you could
19 split it up as far as involvement, how much involvement did you
20 have versus Mr. Smith?

21 A I had -- the only thing that I have involved with this was
22 I was -- I conducted this meeting because there was a conflict
23 with Mr. Smith's schedule on the 4:30 meeting.

24 Q Okay. And was the purpose of the meeting that you
25 conducted to try to answer questions about the Teamsters Union?

1 A No. It had to do with -- it was like a final push towards
2 the election. We had a meeting scheduled with them. And
3 that's what it was.

4 Q All right. And a final push was to try to win the
5 election, correct?

6 MR. GILBERT: Objection, leading again.

7 MS. NISPEROS: Look, I set the foundation to examine this
8 witness.

9 HEARING OFFICER KAUFMAN: As I stated, this is just to --

10 MR. GILBERT: This is 611(c).

11 HEARING OFFICER KAUFMAN: -- lay some foundation to --

12 MS. NISPEROS: Okay.

13 MR. GILBERT: I would move to -- for permission to examine
14 this witness as a 611(c).

15 HEARING OFFICER KAUFMAN: Permission granted.

16 MR. GILBERT: Okay.

17 Q BY MR. GILBERT: Now, sir, would you agree with me that
18 the first time that the Union found out about a possible
19 challenge of Michelle Dorton's vote was when it received the
20 Excelsior list or the voter eligibility list?

21 A Yeah.

22 Q Okay. And I believe administrative notice has been taken.
23 Or I don't know if we stipulated about the Union, but
24 administrative notice has been taken that the Excelsior list
25 was submitted to the NLRB on 4/21 at -- or 4/22, right, at

1 isolated --

2 A Many times. And this particular night too, I was by
3 myself. And when I wrote them out, they were real sloppy. I
4 was just writing scratch down, trying to remember what I -- so
5 I'd have something to remember that I could rewrite.

6 Q Okay, thank you. So, Mr. Bender, you've testified that --
7 and I think it's clear, but just so you understand my question.
8 That the text on Employer 27, so your writing, your notes,
9 reflect topics of concern raised by the folks who attended the
10 meeting. Did all of the numbered paragraphs on Employer 27,
11 does your handwriting reflect -- these all reflect topics of
12 concern that were raised by the women; is that right?

13 A Yes, it was.

14 Q Okay. And let me ask, just before I go further, did you
15 introduce yourself to the folks who attended the meeting on
16 April 30th?

17 A Yes, I did.

18 Q And how did you say when you introduced yourself?

19 A I just told them that I was Steve Bender, representing
20 Teamster Local 853. And we met where the hostess was. And
21 they took us to the table. And then I reintroduced myself
22 again.

23 Q Okay. And when you were having this meeting, you said
24 they took us to a table. Did you have -- and you've -- any of
25 the folks that attended -- and I'm not asking you to give

.494

1 names. But did you have anyone facilitate that meeting for you
2 or did you do the facilitation of the meeting?

3 A Well, I led the meeting.

4 Q Okay. Did you have -- at the time that you were having
5 this meeting, did you have anything with you that had the
6 Teamster logo or something from the Union?

7 A Yeah, I carry a briefcase. And I can't remember exactly
8 what I wore. But usually, I -- we have a pin on our shirt.

9 Q Okay.

10 A I can't remember.

11 Q So did you have any Teamsters logos, anything on you that
12 would indicate to the folks at the meeting that you were with
13 Teamster 853? So this briefcase. Was there anything there?

14 A A briefcase and maybe a pin --

15 Q With the Teamsters logo on it?

16 A Yeah.

17 Q Okay. And again, I'm not asking you to name names. But
18 while you're having this meeting, did you ever indicate to
19 anyone in attendance that Michelle Dorton was working on behalf
20 of the Union, on behalf of Teamster 853?

21 A No, I didn't.

22 Q Okay. And again, I'm not asking you to name names. But
23 did you ask Michelle Dorton to be present and facilitate the
24 meeting with you?

25 A No. This was the first time that I ever met anybody there

1 Q Okay. Can you -- if you recall, can you explain how this
2 topic came up or what the concern was that the women raised?

3 A Yeah. The concern was that the company -- this is from
4 the women, that the company told us that we will have to and
5 would be forced to use the same business agent that the drivers
6 have, because they're Teamsters. That was a big concern of
7 them --

8 Q Okay.

9 A -- of the women.

10 Q And again, this was something that was brought up by the
11 women at the meeting?

12 A Yes.

13 Q You didn't propose that this was an issue that they should
14 be considering?

15 A No, I didn't.

16 Q You didn't say this is what's going to happen if you don't
17 vote for the Union?

18 A No.

19 Q I don't know -- okay, thank you. And referring to
20 paragraph number 4 of your notes, Employer 27, it says: They
21 were tired of the company's ongoing meetings, parentheses,
22 mandatory. Can you tell us what the concern was which was
23 expressed by the women when they brought this up?

24 A They just brought up that they were tired. They wanted
25 this whole process to be over. They were tired of ongoing

1 company mandatory meetings.

2 Q And did they give you any more detail about what their --
3 why they didn't like or why they wanted these ongoing mandatory
4 meetings to stop?

5 A They all decided that they were pretty much one-sided.
6 They were anti-union meetings, and they were just tired of
7 hearing it. They were ready to go towards an election.

8 Q Did any of the women discuss whether or not -- and what
9 did the women tell you about whether these meetings were
10 burdensome or why they didn't like these meetings. Did they
11 give you more detail about that?

12 MR. GILBERT: I'm going to object. We're getting so far
13 off course now. It's entirely irrelevant.

14 HEARING OFFICER KAUFMAN: No. I understand it's --

15 MS. NISPEROS: This is relevant.

16 HEARING OFFICER KAUFMAN: -- not relevant, but I do think
17 she's entitled to test his recollection.

18 MR. GILBERT: Oh, okay. That's fine.

19 HEARING OFFICER KAUFMAN: You were given that leeway. So
20 I have to give her that leeway as well.

21 MR. GILBERT: Not a problem.

22 Q BY MS. NISPEROS: Can you tell us more detail about the
23 concern that they expressed about these meetings and why it was
24 difficult or why they didn't like to go to these meetings?

25 A Well, they were tired of the one-sided meetings that the

1 company was having with them. These women, they wanted to go
2 home. They have mandatory meetings and stuff like that. It
3 went on, I don't know, a week or better. And I just told them
4 that, you know, this is a process that happens at all elections
5 and stuff.

6 Q Okay.

7 A That's about it.

8 Q Okay. Did you, when you were -- during the meeting with
9 the folks who attended, did you ever threaten them?

10 A No.

11 Q Did anyone in -- within the meeting threaten anyone else?

12 A No.

13 Q Did anyone at the meeting, you or anyone who attended,
14 coerce other folks within the meeting?

15 A No.

16 Q And you didn't ask Michelle -- did you ask Michelle Dorton
17 to organize this meeting for you on behalf of the Union and get
18 the workers together?

19 A No, I didn't.

20 Q Did you ask Michelle Dorton to disseminate any information
21 on your behalf at this meeting?

22 A No, I didn't.

23 Q Did you ever, or at this meeting, ask Michelle Dorton to
24 campaign on behalf of the Teamsters Local 853?

25 A No, I didn't.

1 Q Did you ever, during this meeting, tell the Michelle
2 Dorton that workers should go through her in order to
3 communicate with the Union?

4 A No, I didn't.

5 Q Did you ever tell Michelle that you were going to go --
6 that if you wanted to communicate with the workers, you would
7 go through her, that she was the designated point person?

8 A No, I didn't.

9 MS. NISPEROS: No further questions.

10 HEARING OFFICER KAUFMAN: Okay. Any redirect?

11 MR. GILBERT: I do.

12 REDIRECT EXAMINATION

13 Q BY MR. GILBERT: How many meetings did the individuals
14 that were present at your meeting say that the company had
15 conducted? Because I notice it's plural, right? There's a
16 number -- it is meetings?

17 A I'm trying to find -- okay. Can you rephrase -- or --

18 Q Yeah. You used the term -- plural -- the plural term
19 meetings, right?

20 A Yeah.

21 Q You didn't say meeting. You said meetings. How many
22 meetings did they tell you they had to go to?

23 A That they had numerous meetings.

24 Q Numerous. What is that to you, three, four?

25 MS. NISPEROS: Asked and answered.

1 A I don't follow you.

2 Q How did you -- did Mr. Smith ask you to go to the meeting?

3 A Yes.

4 Q And did Mr. Smith give you the time of the meeting?

5 A Yes, he did.

6 Q And what did he tell you?

7 A He told me that the meeting was supposed to start at 7:00
8 and nobody came in until about 7:30. They were at -- attending
9 another meeting at Durham.

10 Q Okay. Were all the individuals eligible to vote present
11 at the meeting?

12 A Every lady was --

13 MS. NISPEROS: Objection. This is not relevant.

14 MR. GILBERT: It absolutely is relevant.

15 HEARING OFFICER KAUFMAN: Well, I think it is relevant,
16 because if there was something objectionable said during the
17 meeting, it goes to show dissemination. So I'm going to allow
18 it.

19 MR. GILBERT: They were all present, correct?

20 THE WITNESS: I believe all the Hayward people were
21 present.

22 Q BY MR. GILBERT: Okay. Well, there's more than Hayward.
23 I'm asking were all of the eligible voters present at the
24 meeting?

25 A Yes, that -- from Hayward.

1 MR. GILBERT: The Employer reasserts its objection that
2 the receipt itself does not establish that the receipt belongs
3 to, pertains to, was in the possession of a Teamsters union
4 and/or the witness. And so, all the receipt establishes is
5 that somebody, at some time, ate at an Applebee's restaurant.
6 So I think that the -- there's not been a sufficient foundation
7 laid for receipt of the receipt into evidence.

8 HEARING OFFICER KAUFMAN: Well, I think there has been
9 enough of a foundation to receive the receipt into evidence.
10 As to what it shows, I agree with you, that's open to debate.
11 And I've asked the Union's counsel to produce the other signed
12 receipt. And so, I'm going to go ahead and receive this into
13 evidence.

14 (Union Exhibit Number 1 Received into Evidence)

15 RECROSS-EXAMINATION

16 Q BY MS. NISPEROS: Okay. Mr. Bender, just a couple of
17 quick questions just to clarify a couple of things that we've
18 talked about. One of the things we talked about was Hayward
19 and who was in attendance at that meeting that you had in
20 Hayward on the 30th. Is it your testimony that you -- at the
21 time that you went to the meeting, you understood that you
22 would be meeting with Hayward employees?

23 A Yes.

24 Q Okay. And is it your testimony that once you arrived at
25 the meeting, there were introductions exchanged and that the

1 women introduced themselves as being from Hayward?

2 A Yes.

3 Q Okay. And is it -- not necessary. Okay, thank you. One
4 or two other quick questions. You gave some testimony about --
5 lots of testimony about your process, going through. And you
6 originally take some notes maybe during a meeting. You like to
7 make them more legible and nicer. And so, you'll then like
8 summarize, as you've said, those meeting notes. So I just want
9 to clarify your process.

10 And sitting here today, do you recall -- around the time
11 that you were taking your original notes from the meeting, do
12 you recall how many -- were there one -- was there one piece of
13 paper or multiple pieces of paper in those original notes?

14 A It was one piece of paper.

15 Q Okay. And so, is it your testimony -- I understood this,
16 but just to clear -- that your original notes reflected what
17 was said in the meeting?

18 A Yes.

19 Q And it's your testimony that you then -- well, let me ask
20 this. When you were creating the summary that we see in
21 Employer 22, were you --

22 MR. GILBERT: Just -- I think it's 27.

23 MS. NISPEROS: Oh, 27. Thank you. I'll fill that in.

24 Q BY MS. NISPEROS: When you were creating the summary in
25 Employer 27, did you do that after you threw away the originals

1 Q Can you describe the types of things that she does on a
2 daily basis?

3 A Well she makes sure that everything is covered.

4 Everything -- okay, routes. We have routes. Our sheets are
5 routes on 913. And we have Fremont routes, Santa Ana routes,
6 Cache Valley routes, San Lorenzo routes. So all of these areas
7 have drivers -- numbers and different drivers. And she has to
8 make sure that you -- that all of those are covered. So we
9 have a 100 and some odd routes. I don't know the exact
10 whatever. I used to when I was a cover driver, but -- but
11 we've got like 100 and maybe 50 routes, or maybe 160 routes
12 now. And so if anything goes down, she has to cover them.

13 And so she has to make sure that everything is covered.
14 If it's not covered she has to make sure that we go back. She
15 has -- we had to make telephone calls to drivers. I mean,
16 there's a lot involved. She has to make sure that the buses
17 are up and everybody has a bus. Just a lot. She takes care of
18 -- if you have time off slips, or whatever, she kind of takes
19 care of the calendar for the time off, because she has to make
20 sure that she has the drivers --

21 Q Can she approve time off?

22 A -- to fill routes. And so she's in charge of that also.

23 Q And can she approve time off?

24 A She -- yes. I've -- she has approved time off for me
25 before in the past. So -- for surgery. I had --

1 P R O C E E D I N G S

2 HEARING OFFICER KAUFMAN: Okay. Let's go on the record.
3 Okay. We are on the record. Before getting started this
4 morning counsel have agreed to entering into a stipulation
5 regarding the Union's receipt of the voter eligibility list.
6 Mr. Gilbert, do you want to present that stipulation?

7 MR. GILBERT: Yes, that the parties stipulate that the
8 counsel for the Employer James N. Foster, Jr., emailed Mr.
9 Rodney Smith a copy of the voter eligibility list on April
10 22nd, 2015, at approximately 11:58, pacific standard time.

11 HEARING OFFICER KAUFMAN: Ms. Nisperos.

12 MR. GILBERT: And that said e-mail was received by Mr.
13 Smith.

14 HEARING OFFICER KAUFMAN: Ms. Nisperos, do you enter into
15 that stipulation?

16 MS. NISPEROS: That's April 22nd, 2015, 11:58 a.m.,
17 pacific, yes.

18 HEARING OFFICER KAUFMAN: Okay. That stipulation is
19 accepted. Also, before going on the record this morning, there
20 was some more discussion about an ongoing dispute regarding the
21 production of an illegible document. I'm going to have the
22 parties go ahead and briefly state their positions regarding
23 that issue for the record, starting with you, Mr. Gilbert.

24 MR. GILBERT: Well, my position, on the record, is that
25 the record is -- it must be -- it should be produced by

1 Whereupon,

2 SHIRLEY MYERS

3 having been duly sworn, was called as a witness herein and was
4 examined and testified as follows:

5 HEARING OFFICER KAUFMAN: Please state and spell your name
6 for the record.

7 THE WITNESS: Shirley Myers, S-H-I-R-L-E-Y M-Y-E-R-S.

8 DIRECT EXAMINATION

9 Q MR. GILBERT: Good morning, Ms. Myers. How are you?

10 A I'm fine. Thank you.

11 Q Good. My name is Geoff Gilbert. I'm the attorney for the
12 Employer, and I'm going to ask you some questions today. If
13 you don't understand the question or if I use a term or a
14 phrase that just doesn't make sense to you, if you would just
15 ask me to rephrase, I'd be happy to do so. Is that acceptable?

16 A That's acceptable.

17 Q And, ma'am, are you able to testify truthfully today?

18 A Yes.

19 Q Okay. Are you currently employed?

20 A Yes.

21 Q By whom?

22 A Durham School Services.

23 Q And what is your current job title?

24 A I'm the administrator there.

25 Q And can you just describe, for the record, what you do as

1 the administrator? I know you do a lot, so.

2 A I am HR, billings AP/AR, I answer to the GM.

3 Q So you do -- you used some, I think they're called

4 acronyms, right? So just so the record is clear, can you kind

5 of just go through what those acronyms stand for? AR is?

6 A Accounts receivable, accounts payable, human resources.

7 Sometimes I assist with payroll, and I do all the billing for

8 all incoming monies.

9 Q So Durham services school districts, correct?

10 A Correct.

11 Q Do you -- so when you said you do billing --

12 A Uh-huh.

13 Q -- is that billing to the school districts?

14 A Correct.

15 Q And accounts receivable, I assume that's when they pay

16 Durham, right?

17 A Yes. Yes.

18 Q Okay. So you're responsible for kind of reconciling the

19 books on those issues?

20 A Yes.

21 Q And how long, ma'am, have you been performing the duties

22 and responsibilities of the administrator?

23 A A year-and-a-half almost.

24 Q And are you currently employed at the Durham Customer

25 Service Center in Hayward, California?

1 A Correct.

2 Q And have you been performing the duties of the
3 administrator position for a year-and-a-half at the Durham
4 School Services facility in Hayward, California?

5 A Yes.

6 Q And prior to being the administrator at the Durham
7 facility in Hayward, did you perform any other duties and
8 responsibilities for Durham?

9 A Yes, I was a bus driver.

10 Q And how long, ma'am, were you a bus driver?

11 A A year-and-a-half.

12 Q Where did you work for Durham School Services as a bus
13 driver?

14 A Hayward.

15 Q Other than your three years of bus driving and
16 administrator duties with Durham, have you performed any other
17 duties and responsibilities with Durham School Services?

18 A I've just been involved in enjoy the ride and as training
19 -- a bit of training.

20 Q Okay. Is three years -- were you hired by Durham three
21 years ago, approximately?

22 A Yes, approximately. Well, August is three years.

23 Q August of this year.

24 A Yeah, so we're --

25 Q So August of 2012.

1 A --- a little shy of it. Yeah.

2 Q Okay. Ma'am, were you eligible to vote in the May 8th,
3 2015 election that occurred at Durham School Services in
4 Hayward, California?

5 A Yes.

6 Q And, ma'am, prior to the voting at the actual date of the
7 election, did you attend any Union meetings?

8 A Yes.

9 Q And I'm going to focus on that first Union meeting that
10 you attended.

11 A Okay.

12 Q How did you find out about the meeting?

13 A Michelle.

14 Q And when you talk about Michelle, is that Michelle Dorton?

15 A Yes.

16 Q And just for the record, what is your understanding as to
17 Michelle Dorton's position?

18 A Lead dispatch.

19 Q And how did you find out about the meeting from Michelle?

20 A Basically, she took me onto the side and said we're going
21 to join the Union, we're going to be having a meeting, and
22 don't say anything about it.

23 Q Okay. And did Ms. Dorton exert any pressure on you to go
24 to the meeting?

25 A She said it was important and that we needed to go.

1 Q Did you feel like you had a choice to go?

2 A I felt like I needed to be there more than not go.

3 Q And you mentioned Ms. Dorton. Was Ms. Dorton an open
4 supporter of the Union?

5 A I feel like she wanted the Union from the beginning, yes.

6 Q And is it fair to say she was very passionate about her
7 support for the Union?

8 A That's fair.

9 MS. NISPEROS: Objection. Leading.

10 HEARING OFFICER KAUFMAN: Why don't you rephrase?

11 MR. GILBERT: Sure.

12 Q BY MR. GILBERT: Can you describe the amount of enthusiasm
13 that --

14 MS. NISPEROS: Objection. Leading.

15 HEARING OFFICER KAUFMAN: I don't think that's leading.
16 Go ahead.

17 Q BY MR. GILBERT: -- the amount of enthusiasm Ms. Dorton
18 displayed in support of the Union?

19 A I can only tell you that she wanted it and supported it in
20 every way.

21 Q Was she vocal?

22 A She was vocal.

23 Q Did Ms. Dorton give you any reason why you should go to
24 that first Union meeting?

25 A Yes.

1 Q What was the reason?

2 A To secure our jobs. To watch out for our jobs.

3 Q Okay. At any time, did Ms. Dorton try to give you an
4 authorization card?

5 A No. She -- well, she offered one, I never took it. She
6 asked about it. I never saw it or took it.

7 HEARING OFFICER KAUFMAN: When was that?

8 THE WITNESS: Oh, goodness. Maybe two weeks before the
9 meeting, first meeting. I can't recall, to tell you the truth.
10 This whole thing happened within a month, it seems like.

11 HEARING OFFICER KAUFMAN: Do you recall the date of the
12 first meeting?

13 THE WITNESS: It had to be in April.

14 HEARING OFFICER KAUFMAN: Can you narrow that down at all?

15 THE WITNESS: No.

16 HEARING OFFICER KAUFMAN: Okay.

17 THE WITNESS: I should have taken notes, I guess. I
18 didn't think of it.

19 HEARING OFFICER KAUFMAN: Do you remember where the
20 meeting took place?

21 THE WITNESS: Yes. The first meeting was at Togo's in
22 Hayward.

23 MR. GILBERT: Can I, for the first time, in this process
24 ask for a cup of water? I don't know why my mouth is so dry
25 this morning.

584

1 HEARING OFFICER KAUFMAN: I apologize we don't have bigger
2 cups.

3 MR. GILBERT: The copy of the Dennis cups surely, so.

4 THE WITNESS: Oh.

5 MR. GILBERT: Would you like a Dennis cup of water?

6 THE WITNESS: No, I'm good.

7 Q BY MR. GILBERT: Ma'am, did you ever have an occasion to
8 speak with Ms. Dorton in the break room about voting in the
9 Union election?

10 A Yes.

11 Q And was anyone else present?

12 A No.

13 Q Can you state, for the record, what was said and by whom?

14 A I was trying to talk with Michelle about her feelings, and
15 I was trying to make up my mind about which way to vote. And
16 at this point I was really at a no. And I asked her if I voted
17 no, and the Union was a good thing, would you hold that against
18 me? Would the group hold it against that person? And she
19 says, no, you can vote how you want, but it would always be in
20 the back of my mind.

21 Q And how did you take that comment?

22 A That she wouldn't forget it.

23 Q Well, does Ms. Dorton have the ability to affect your work
24 life?

25 A Not my perform -- not per se what I do in the office, but,

1 of course, she's in the office and if she -- if one of your
2 employees doesn't necessarily like you or has something against
3 you, then, you know, it's going to affect you.

4 Q Does Ms. Dorton have a group of close people, the kind
5 of -- you know, that she's --

6 A I'm going to be -- all the girls who have worked together
7 from 16 to 22 years. So there you have it.

8 Q And then after the election, ma'am, did Ms. Dorton ever,
9 for lack of a better term, call you out on how you voted?

10 MS. NISPEROS: Objection; leading.

11 HEARING OFFICER KAUFMAN: Do you want to rephrase?

12 Q BY MR. GILBERT: After the election, did Ms. -- did you
13 ever talk to -- did Ms. Dorton ever say anything to you about
14 your vote?

15 MS. NISPEROS: Objection. We're talking about after the
16 election.

17 MR. GILBERT: Yes, we are.

18 MS. NISPEROS: It's irrelevant to the critical period.

19 MR. GILBERT: It goes to that she wouldn't forget it and
20 now there was a comment made thereafter.

21 HEARING OFFICER KAUFMAN: I tend to agree that it's
22 probably not relevant, but I'll go ahead and allow it.

23 THE WITNESS: Yes.

24 Q BY MR. GILBERT: And what happened there, ma'am?

25 A Nothing. It was just -- she said that it was obvious how

1 I voted and, you know, it was no big surprise.

2 Q And did that occur in front of other --

3 A Yes.

4 Q -- employees?

5 A I can't tell you what driver was there, but there was a
6 driver there.

7 MS. NISPEROS: Again, a standing objection to the relevance
8 of anyone questioning referring to post election conduct.

9 HEARING OFFICER KAUFMAN: Okay. The standing objection is
10 noted.

11 Q BY MR. GILBERT: Ma'am, does Michelle Dorton have the
12 ability to grant time off?

13 A Yes.

14 Q And, ma'am, prior to -- well, let me ask you this: Did
15 you ever learn about the fact that the Employer had reserved
16 the right to challenge Ms. Dorton's vote and Ms. Corley's vote?

17 A Did I learn?

18 Q Yes, ma'am?

19 A Yes. That morning.

20 Q Okay. Well, let me -- so -- that's fine. So let me
21 clarify. When you say that morning, what morning are you
22 talking about?

23 A The voting morning.

24 Q Okay. At any time prior to the vote, at any Union
25 meeting -- strike that. How many Union meetings occurred, to

1 your recollection?

2 A Two.

3 Q Okay. At either of those Union meetings, did you learn
4 that the Employer intended or reserved the right to challenge
5 Ms. Dorton's and Ms. Corley's vote?

6 A No, I've never known -- known of a challenge before that
7 day or, you know, what it was.

8 Q Okay. On the day of the vote, was Ms. Dorton very vocal
9 about her position on the Employer's --

10 MS. NISPEROS: Objection; leading.

11 MR. GILBERT: How is this leading?

12 Q BY MR. GILBERT: Okay. On the day of the vote, did
13 Ms. Dorton say anything about the Employer's right to challenge
14 your vote?

15 A She was verbal about how she felt and how she -- yeah. Of
16 course.

17 Q What did she say, if you recall?

18 A Many things. "Shady. How can they do this? I didn't
19 know I was a supervisor. News to me." You know, things like
20 this.

21 Q And how close was that to the time of the vote result?

22 A Within -- close. Like -- you know, honestly I can't
23 recall if it was after or before the vote.

24 Q Well, did you left turn about the Employer's right to
25 challenge -- did you learn about the Employer's challenge --

1 you learned about it before the vote, correct?

2 A Correct.

3 Q Did any other eligible voters come to you about the
4 challenge issue?

5 A Well, I learned it from Darlene.

6 Q Okay.

7 A She called me in her office when I was walking down the
8 hallway and she says, "We've been challenged." And I said,
9 "What does that mean?" And she didn't tell me clearly -- I
10 don't think she knew herself -- saying -- she just stated that,
11 "They think I'm a supervisor and think Michelle's a supervisor
12 and that the vote doesn't count." That's what I thought. And
13 then it went from there.

14 Q Ma'am, is -- who's the only -- well, who -- who is
15 responsible for closing the facility?

16 A Michelle and -- and/or Candy. Michelle is the latest to
17 leave I believe. She closes the facility.

18 Q Did you learn about the Union meetings from -- well, who
19 did you learn about the Union meetings from?

20 MS. NISPEROS: Objection; leading.

21 MR. GILBERT: How was that leading honestly?

22 HEARING OFFICER KAUFMAN: I -- overruled.

23 THE WITNESS: You know, all the girls, different times.

24 Q BY MR. GILBERT: Well, there was only -- and I'm not --
25 but there were two meetings, right?

1 A Yeah, but we -- I mean all the girls discussed it with me,

2 so --

3 Q Understood. But the first meeting, you testified that

4 Michelle told you about it, correct?

5 A She said, "There's going to be a meeting." She didn't --

6 Q Okay.

7 A I don't know if she necessarily told me herself it was at

8 Togo's and everything. I -- I learned from the other girls.

9 But I knew that there was going to be a meeting and --

10 Q Okay.

11 A -- and there was going to be a -- and that it was vital to

12 be there.

13 Q Do you know an employee by the name of Adela Garcia?

14 A I do.

15 Q And in your capacity, is the -- well, strike that. Is the

16 facility -- how -- how large would you say the facility is?

17 A The whole facility?

18 Q Yes.

19 A It's a good size. About 3,000 -- four or five -- 4,000

20 square feet. I don't know.

21 Q Okay. How far is your office from the dispatch office?

22 A Oh, it's way in the back. It's --

23 Q Well, would you agree with me that it's probably 50 steps

24 from your office to the dispatcher office?

25 A Yes.

1 Q Okay. And -- so in your capacity as the administrator,
2 are you able to observe the day-to-day activities in the
3 dispatch office?

4 A I'd say so.

5 Q Yeah. And, ma'am, have you ever witnessed Ms. Dorton
6 direct the work of Adela Garcia?

7 A Yes.

8 MS. NISPEROS: Objection; calls for a conclusion.

9 HEARING OFFICER KAUFMAN: If you could break that down a
10 little.

11 MR. GILBERT: I was going to ask her what -- what she's
12 seen. I mean -- I'm going to ask her now what -- what --

13 HEARING OFFICER KAUFMAN: Okay.

14 MR. GILBERT: -- have you seen.

15 HEARING OFFICER KAUFMAN: Okay.

16 Q BY MR. GILBERT: And so can you describe what you
17 witnessed in that respect?

18 A Just to call routes out or, have you done certain things,
19 have you called that parent. Things like this.

20 Q And have you seen -- have you witnessed Ms. Dorton assign
21 work to Adela Garcia?

22 A Yes.

23 Q And can you describe in that respect what you've seen?

24 A The same thing. "Make sure those buses are in," or
25 "Make" -- you know, I can't -- you know, I can't verbatim, but

591

1 I know that I've seen her give her work. "Check the" -- "Check
2 the binder. Make sure the binder's okay. Did you route those
3 kids? Did you, you know, answer that phone?" Whatever.

4 Q Ma'am, have you ever witnessed Ms. Dorton reprimand any
5 employees?

6 A That's a hard one because it's -- Ms. Dorton is not --
7 doesn't act in a professional -- as I would. So if she were
8 to -- if she was upset with one of the drivers, they didn't do
9 a route, or whatever, she would kiddingly, you know, give them
10 grief, I guess. "You know you should have done that route for
11 me," or, "did it." Or, "Where were you I called you?" This
12 type of stuff. I've never seen her, you know --

13 Q Issue a warning?

14 A -- "You will answer me next time when I call you on the
15 radio," type thing.

16 Q Ma'am, at any time did you hear racism --

17 MS. NISPEROS: Objection; relevance.

18 HEARING OFFICER KAUFMAN: Overruled.

19 MR. GILBERT: I would appreciate it in the future -- I
20 think it's a courtesy -- that the counsel be allowed to at
21 least ask the question before the objection is asserted. I
22 mean I think that's just a common courtesy.

23 HEARING OFFICER KAUFMAN: Okay. Let's move on.

24 MR. GILBERT: It's -- again, I don't have a problem with
25 objecting. I mean I understand that, I respect that, but I --

1 just if I can get my question out.

2 Q BY MR. GILBERT: So did you, ma'am, at any time ever hear
3 racism associated with the Employer's decision -- or decision
4 to reserve its right to challenge the votes of Michelle Dorton
5 and Darlene Corley?

6 A Yes.

7 Q Okay. Ms. Myers, did you ever lose sleep about your
8 decision that you wanted to vote no because you thought you
9 might face repercussions?

10 MS. NISPEROS: Objection; relevance.

11 HEARING OFFICER KAUFMAN: That is an objective standard.
12 We don't take employees subjective reactions into
13 consideration. So do you really want to go there? I'll allow
14 the question, but that's my -- that's my --

15 MR. GILBERT: Okay. Understood.

16 HEARING OFFICER KAUFMAN: -- position.

17 THE WITNESS: This whole thing's been stressful from the
18 beginning.

19 Q BY MR. GILBERT: Did you ever have a conversation with
20 Ms. Nelson after the petition was filed but before the vote
21 about your fear of retaliation and intimidation?

22 A Yes.

23 Q And what did you say to Ms. Nelson?

24 A I don't remember the exact words, but I do know I conveyed
25 to her that I was concerned because the girls had been working

1 together so long. You know, they have -- they're a click.

2 So --

3 MS. NISPEROS: Objection. This is not responsive.

4 MR. GILBERT: And the --

5 MS. NISPEROS: There's no comment as to a retaliation.

6 THE WITNESS: I was -- I was concerned about how they would
7 react if I voted no, yes. And I just kind of communicated that
8 with her.

9 Q BY MR. GILBERT: Was Michelle the one you were the most
10 concerned about?

11 A Not necessarily.

12 MR. GILBERT: Nothing further.

13 HEARING OFFICER KAUFMAN: You said you heard something
14 about racism in connection with the Employer's decision to?

15 THE WITNESS: Uh-huh.

16 HEARING OFFICER KAUFMAN: Is that what you said? When did
17 you hear that?

18 THE WITNESS: In the lobby when they were tallying the
19 votes I believe, when they were counting the votes and getting
20 it ready to call us in there to tell us.

21 HEARING OFFICER KAUFMAN: Can you -- can you provide in the
22 record in a little more detail about that, when and what she
23 heard?

24 Q BY MR. GILBERT: What did you hear about it?

25 A Candy said, "I think it's a race thing. The only two

594

1 black females out of the group they call supervisors." And I -

2 - and I said, "That's bullshit." I mean I said that.

3 Q It's okay. You've got to --

4 A I said, "That's bullshit." And I said, "How can you even

5 think that way?" And then Michelle was like, "No, I don't

6 think it's a race thing."

7 Q And when did that occur?

8 A In the lobby. I believe when they -- we were waiting for

9 the voting decision.

10 Q And on the day the election?

11 A Yes. Out in the open --

12 Q And do you --

13 A -- for everyone to hear.

14 Q Do you know if Candy changed her vote?

15 A I do. I feel in my heart definitely Candy changed her

16 vote --

17 MS. NISPEROS: Objection.

18 THE WITNESS: -- the last moment.

19 MS. NISPEROS: Nonresponsive.

20 HEARING OFFICER KAUFMAN: But the question was whether you

21 know.

22 Q BY MR. GILBERT: Did she ever tell you --

23 A Yes, I know. She told me.

24 MR. GILBERT: And we're going to call Candy, so I --

25 I'll elicit that testimony, so --

1 HEARING OFFICER KAUFMAN: Okay.

2 MR. GILBERT: Nothing further.

3 HEARING OFFICER KAUFMAN: Can -- can I just clarify? That

4 conversation, was that before or after the employees had voted?

5 THE WITNESS: The race thing?

6 HEARING OFFICER KAUFMAN: Yes.

7 THE WITNESS: I'm thinking it's --

8 HEARING OFFICER KAUFMAN: I'm sorry. Yeah, I should have

9 been more specific. The conversation about the alleged

10 racism --

11 THE WITNESS: I'm -- I'm feeling --

12 HEARING OFFICER KAUFMAN: -- in connection with this --

13 THE WITNESS: -- it's after because Candy was sitting next

14 to me and I had wanted to talk to her before voting. So, yeah,

15 it was after.

16 HEARING OFFICER KAUFMAN: It was after the --

17 THE WITNESS: Yeah.

18 HEARING OFFICER KAUFMAN: -- employees voted?

19 THE WITNESS: Uh-huh.

20 HEARING OFFICER KAUFMAN: Okay. Cross?

21 MS. NISPEROS: If I could just take a moment to review.

22 HEARING OFFICER KAUFMAN: Okay.

23 MR. GILBERT: Sure you don't want water?

24 THE WITNESS: No. I'm good.

25 HEARING OFFICER KAUFMAN: While, Ms. Nisperos is getting

1 ready for cross, I think I'd like to ask a couple of clarifying
2 questions.

3 Ms. Myers, who do you report to?

4 THE WITNESS: General --

5 HEARING OFFICER KAUFMAN: And I'm sorry if we -- if we
6 already established that. Please --

7 THE WITNESS: Ron Muller, General Manager.

8 HEARING OFFICER KAUFMAN: And the -- the meeting that you
9 referred to in April the at Togo's, can you tell me who else
10 was there?

11 THE WITNESS: Yes.

12 HEARING OFFICER KAUFMAN: Okay. Go ahead.

13 THE WITNESS: Sherry Head, Candace Comandao.

14 HEARING OFFICER KAUFMAN: And -- and their titles, please,
15 if you know.

16 THE WITNESS: Oh. Sherry Head is a router --

17 HEARING OFFICER KAUFMAN: Uh-huh.

18 THE WITNESS: -- and Candace Comandao is a router. And
19 Michelle Dorton, lead dispatch, and Adela Garcia, dispatch, as
20 far as I know, I am administrator, Darlene Corley is payroll a
21 assistance, is what it says on her door. I don't know what her
22 true title is.

23 HEARING OFFICER KAUFMAN: And you said that Ms. Dorton
24 attempted to give you an authorization card during that
25 meeting?

597

1 THE WITNESS: They were passed out. I don't think that she
2 passed it to me. I think it was passed out by Rodney.

3 MR. GILBERT: If I could clarify?

4 HEARING OFFICER KAUFMAN: Yeah. Please clarify.

5 Q BY MR. GILBERT: Prior to the meeting --

6 A Prior, yeah.

7 Q -- Ms. Dorton tried to give you a card?

8 A Yes. And -- and at Hayward CSC, she asked me did I want a
9 card.

10 HEARING OFFICER KAUFMAN: Okay. Where was that again?

11 THE WITNESS: In the office.

12 HEARING OFFICER KAUFMAN: Okay.

13 THE WITNESS: In her office.

14 HEARING OFFICER KAUFMAN: Okay. I'm sorry. My confusion.
15 So I appreciate you clarifying that.

16 MR. GILBERT: And also, just to clarify --

17 HEARING OFFICER KAUFMAN: Uh-huh.

18 Q BY MR. GILBERT: Was the staff member eligible to vote
19 from Livermore at that first meeting?

20 A No.

21 Q Okay. And so do you want to identify for the record who
22 that is?

23 A Susan Robbins.

24 CROSS-EXAMINATION

25 Q BY MS. NISPEROS: Ms. Myers, my name is Dalisai Nisperos.

1 I'm the attorney for Teamsters Local 853. And I'm just going
2 to ask you a couple of questions about the things that you just
3 shared with us now. If I --

4 A Great.

5 Q -- if I don't ask my question clearly or you don't
6 understand, just me know. Okay?

7 A Uh-huh.

8 MR. GILBERT: Is that a "yes?" I'm not trying to be --

9 THE WITNESS: Yes. Sorry.

10 MR. GILBERT: Okay.

11 Q BY MS. NISPEROS: You explained to the Hearing Officer
12 earlier that all the girls discussed in, I believe you were
13 referencing a meeting, and I believe you also said that you
14 knew from all the girls that there was going to be a meeting.
15 Do you remember that?

16 A Uh-huh.

17 Q Can you tell me the Hearing --

18 MR. GILBERT: Is that a "yes?"

19 THE WITNESS: Yes.

20 Q BY MS. NISPEROS: Can you explain for the Hearing Officer
21 what you meant by that?

22 A Well, it was discussed with all the women that we were
23 going to go, where we were going to go, when we were going to
24 go, where was -- where were going to eat, when was it going to
25 be.

1 Q So just so I understand correctly, you're saying you all
2 the woman discussed that you would go when and where it was
3 going to happen? Is that what you were testifying?

4 A Well --

5 Q You were talking about together?

6 A Yes.

7 Q Okay.

8 A Yes. I mean the women in the -- in my office.

9 Q I'm sorry?

10 A The women in my office. Not Susan apparently. And the
11 meeting was canceled a couple of times I think. We couldn't --
12 we -- you know, we went to go once and then we didn't go. And
13 then I think --

14 Q And you talked about this together?

15 A Uh-huh.

16 Q Okay. Thank you.

17 MR. GILBERT: Is that a "yes?"

18 THE WITNESS: Yes.

19 MR. GILBERT: And I'm not trying to be rude. I just --

20 THE WITNESS: I know. I -- I keep doing that.

21 Q BY MS. NISPEROS: And but I think you referred to the
22 ladies or the girls. Are you referring to the staff in the
23 Hayward Customer Service Center?

24 A I'm referring to Sherry, Candace, Darlene and Michelle.

25 Q So it's fair to say that there were multiple -- the folks

1 who were eligible to vote on May 8th, multiple people were
2 discussing these -- the topics of meetings, when they would
3 happen, how you would go together?

4 A Yeah. That's -- yes.

5 Q Okay. Thank you. A couple more questions. You also
6 talked about that it was stressful from the beginning. Do you
7 remember --

8 A Yes.

9 Q -- saying that?

10 A Yes.

11 Q When you say "it," can you explain to the Hearing Officer
12 what you're referring to?

13 A The idea of a Union coming in.

14 Q And you also testified about an April 8th meeting at
15 Togo's. At that meeting, did -- you said that Michelle Dorton
16 was present. Did she ever threaten you and say that, "You
17 better sign a Union card or else something bad would happen?"
18 Anything to that effect? In other words, threaten you that she
19 would do something to you if you didn't vote for the Union.

20 A Not -- not one on one, no.

21 Q And you also testified that you report to Ron Muller,
22 correct?

23 A Yes.

24 Q Okay. Is he your supervisor?

25 A Yes. He's my immediate supervisor.

601

1 Q He's --

2 A He's my immediate supervisor.

3 Q Okay. So I would -- it's a fair to say then that Michelle
4 Dorton is not your supervisor?

5 A She's not my supervisor.

6 Q Okay. And do you know whether Ron Muller is a supervisor
7 for anyone else who was eligible to vote on May 8th?

8 A Ron Muller is the General Manager. He I would assume
9 oversees everyone.

10 MR. GILBERT: We'll stipulate that Mr. Muller is the
11 highest ranking official at the facility and was the supervisor
12 of the facility.

13 HEARING OFFICER KAUFMAN: Okay.

14 MS. NISPEROS: I'll stipulate to that.

15 HEARING OFFICER KAUFMAN: Stipulation accepted.

16 Q BY MS. NISPEROS: Do you know whether Ron Muller is the
17 direct supervisor of anyone who was eligible to vote on May
18 8th?

19 A Ron Muller is above us all. So that's -- direct
20 supervisor? He's my direct supervisor. There's another
21 supervisor on site, an operation supervisor, who is Sandra. So
22 there's a little bit of climbing there before getting to Ron.

23 Q Okay. Do -- Ron Muller or Sandra, as far as you know, are
24 they direct supervisors of anyone who voted on May 8th?

25 A Yes.

1 Q Okay. Can you explain to the Hearing Officer what you
2 mean by that or who -- who --

3 A They are -- they are -- Ms. Sandra is operation
4 supervisor. She -- I believe she's in charge of the dispatch
5 and -- and safety. She's involved in safety as well. And Ron
6 Muller oversees everyone. He's General Manager.

7 Q Okay. So is it your testimony that -- and we're referring
8 to Sandra Wilson, right?

9 A I -- what?

10 Q We're referring to Sandra Wilson, right?

11 A Yes.

12 Q Okay. And is it your testimony that Sandra Wilson is the
13 direct supervisor of the folks who were able to vote May 8th?

14 A Not all of them. Some of them.

15 Q Which -- which are you referring to?

16 A She would be Adela's and Michelle's, and I'm not sure
17 about Candace and -- and Sherry. I'm assuming yes. She's not
18 my supervisor.

19 Q Sandra Wilson is not your direct supervisor?

20 A No. But if --

21 Q But Ron Muller is?

22 A -- if Ron's absent, she is --

23 Q Okay.

24 A -- of course.

25 Q Okay. So you said Sandra Wilson is the direct supervisor

1 of a Adela, you believe also for Candace and also the direct
2 supervisor of Shirley, correct?

3 MR. GILBERT: I will --

4 THE WITNESS: Not Shirley.

5 MR. GILBERT: -- object that that mischaracterizes the
6 witness' testimony. She said she didn't know about Candace or
7 about Sherry.

8 Q BY MS. NISPEROS: Do you believe that -- do you have -- is
9 it your understanding that Sandra Wilson is the direct
10 supervisor of Candace and Shirley?

11 MR. GILBERT: Object. It calls for speculation.

12 THE WITNESS: I'm Shirley.

13 Q BY MS. NISPEROS: I'm sorry?

14 A I'm Shirley. I'm --

15 Q Oh, I'm sorry.

16 A -- under Ron.

17 MR. GILBERT: And I object. It calls for speculation.

18 THE WITNESS: That's Sherry.

19 MR. GILBERT: The witness said she doesn't know.

20 MS. NISPEROS: Sherry. That's not what she testified.

21 THE WITNESS: I --

22 HEARING OFFICER KAUFMAN: The record -- the record will --
23 the record will -- just restate your question, please.

24 MS. NISPEROS: Okay.

25 Q BY MS. NISPEROS: It's your understanding that Sandra

1 Wilson is the direct supervisor of Candace, right?

2 MR. GILBERT: Objection; asked and answered. The witness
3 said she didn't know but she would -- could assume.

4 HEARING OFFICER KAUFMAN: I'm going to allow the -- the
5 record will speak for itself. But go ahead and answer --

6 THE WITNESS: Well, I'm --

7 HEARING OFFICER KAUFMAN: -- answer the question again.

8 THE WITNESS: -- I'm -- yes. I would say yes. The girls
9 go to her for help. Yes, that's her -- their supervisor.

10 My -- my standing is is that I'm not sure what's in Sandra
11 Wilson's job description. I don't know if she just runs -- if
12 she's more dispatch or routing or --

13 MS. NISPEROS: Sure.

14 THE WITNESS: -- everyone.

15 Q BY MS. NISPEROS: Gotcha. Okay. Let ask about that.

16 So --

17 A I assume everyone.

18 Q -- when you say that Sandra Wilson is --

19 HEARING OFFICER KAUFMAN: We don't -- we don't -- we don't
20 want you to assume. If you don't know, please tell us that you
21 don't know the answer --

22 THE WITNESS: I'm not --

23 HEARING OFFICER KAUFMAN: -- to a question.

24 THE WITNESS: I'm not sure. I don't know.

25 HEARING OFFICER KAUFMAN: Okay. You don't know --

605

1 THE WITNESS: Her -- well, Sherry and Candy answer -- go to
2 Sandra for supervisory questions. So.

3 Q BY MS. NISPEROS: Okay. Can you explain to the Hearing
4 Officer what you mean when you say that Candace and Sherry go
5 to Sandra for supervisory questions?

6 A If a route's down or they need help, they go to
7 Ms. Sandra.

8 Q And why do they go to her? When you say go to her for
9 help, what do you mean?

10 A They go to her --

11 Q For direction, guidance?

12 A -- they go to Michelle, they go -- and to dispatch. They
13 all discuss it together.

14 Q So it's your standing that Michelle Dorton is not your
15 supervisor?

16 A She's not my supervisor.

17 Q Who between Sandra Wilson or Michelle Dorton, if either of
18 them -- did either of those two have any role in hiring you,
19 Michelle Dorton or Sandra Wilson? Well, let me ask it this
20 way: Who hired you? Do you --

21 A Paul.

22 Q Okay.

23 A He's no longer there. Paul Bracco.

24 Q Do you know whether Michelle has the authority to hire or
25 fire?

1 A No, I don't know that.

2 Q Do you know if she has transferred people or can transfer
3 people?

4 A No.

5 Q Has she ever disciplined -- has Michelle Dorton ever
6 disciplined you? In other words, given you a verbal warning or
7 a written warning?

8 A No.

9 Q Okay. And so Michelle has come to you and said, "Here's
10 some work for you to do. I want you to do this work. I'm
11 ordering you to do this?" She's --

12 MR. GILBERT: Are we --

13 Q BY MS. NISPEROS: -- never done that?

14 MR. GILBERT: Are we talking about specific words? Is that
15 what we're talking about now? I mean I object. The question
16 is -- it's ambiguous in that are we talking about those
17 specific words or are we talking about --

18 HEARING OFFICER KAUFMAN: Can you go ahead and restate the
19 question, please?

20 Q BY MS. NISPEROS: It's fair to say that Michelle Dorton,
21 since she's not your supervisor, she doesn't -- it's fair --
22 since Michelle -- you said Michelle Dorton is not your
23 supervisor, right? So isn't it --

24 A Correct.

25 Q -- isn't it also fair to say that she doesn't -- that

1 Michelle does not assign you work?

2 A Yes.

3 Q And so it's also fair to say that Michelle doesn't order
4 you to do things to -- she doesn't order you to complete work
5 tasks, right?

6 HEARING OFFICER KAUFMAN: Mr. Gilbert, is the Employer
7 disputing that Michelle Dorton is not Ms. Myers' supervisor?

8 MR. GILBERT: No.

9 HEARING OFFICER KAUFMAN: So --

10 MS. NISPEROS: If there's a stipulation that Michelle
11 Dorton is not the Section 211 supervisor as to Shirley, I'll
12 offer that and we can cut through some of this.

13 MR. GILBERT: We so stipulate.

14 HEARING OFFICER KAUFMAN: Okay. So let's move on.

15 MS. NISPEROS: Just to cut through, is the Employer willing
16 to stipulate that Michelle Dorton is not the supervisor of
17 Adela?

18 MR. GILBERT: No.

19 MS. NISPEROS: I mean I -- I have questions as to all these
20 unit members, so --

21 MR. GILBERT: Well, I'd like --

22 MS. NISPEROS: It would make things move along.

23 MR. GILBERT: -- foundation laid again that this witness
24 has some --

25 HEARING OFFICER KAUFMAN: I would agree.

1 MR. GILBERT: -- knowledge about the day-to-day activities
2 of -- as it relates to Ms. Dorton and, for example, Sherry or
3 anybody else.

4 HEARING OFFICER KAUFMAN: I would agree. And -- and you
5 can call those witnesses and examine them directly.

6 Q BY MS. NISPEROS: Are you familiar with the job duties
7 of -- strike that. I'm going to other questions.

8 You've been working in the dispatch office for several
9 years you testified, right?

10 MR. GILBERT: Objection; mischaracterizes her testimony.
11 She didn't --

12 Q BY MS. NISPEROS: How long --

13 A I've been working at Hayward CSC. So, yeah.

14 Q And you've been working at the --

15 A Not in the dispatch it was.

16 Q Okay. Hayward CSC --

17 A Yes.

18 Q -- apologies -- for several years, right?

19 A Uh-huh.

20 Q And so you're familiar --

21 A Yes.

22 Q And so you're familiar with the way that people work
23 together, folks -- the -- the other people in your customer
24 service center? You're familiar with how people work together,
25 the supervisory structure within the office?

1 A Yes.

2 Q Who does what --

3 MR. GILBERT: Objection.

4 Q BY MS. NISPEROS: -- job duties? Can you tell us --

5 MR. GILBERT: Objection --

6 Q BY MS. NISPEROS: Can you tell us how?

7 MR. GILBERT: Objection; vague and ambiguous and compound.

8 She said how they work together and a supervisory relationship.

9 So it's a compound question.

10 HEARING OFFICER KAUFMAN: Okay. Do you want to go ahead

11 and restate -- rephrase?

12 Q BY MS. NISPEROS: You're familiar -- are you familiar with

13 the supervisory relationships between Ron Muller, Sandra

14 Wilson, Michelle Dorton and the other employees?

15 A Yes.

16 Q Okay. Are you familiar with the job duties of the other

17 -- of your co-workers, in the customer -- in the Hayward

18 Customer Service Center?

19 A Does it have to be yes or no or can I --

20 HEARING OFFICER KAUFMAN: Well, if -- if you --

21 THE WITNESS: -- elaborate? I mean I know some of their

22 duties, I don't know their exact -- I'm familiar, yes.

23 HEARING OFFICER KAUFMAN: Okay.

24 Q BY MS. NISPEROS: Are you familiar with the job duties of

25 Adela?

1 A I am.

2 Q Can you describe those duties?

3 A She is morning dispatch. She opens up with Eliza
4 (phonetic). She helps the drivers throughout the day. She
5 also does my liquidated damages and she assists Michelle.

6 MS. NISPEROS: I don't have no other questions.

7 HEARING OFFICER KAUFMAN: Okay. Any redirect?

8 MR. GILBERT: Just I think one or two.

9 REDIRECT EXAMINATION

10 Q BY MR. GILBERT: When counsel was asking you about --
11 there was a meeting in Togo's and I think she asked you if
12 Michelle Dorton ever said something like, "You better sign a
13 card," or threatened you in any way, and your answer was -- I
14 wrote it down -- "Not one on one." Can you just explain what
15 you meant by that?

16 A It was -- when we were all signing, it is said out loud,
17 "If you" -- "If you want your job, you better sign this card."

18 Q And who said that?

19 A Michelle.

20 HEARING OFFICER KAUFMAN: When was that?

21 THE WITNESS: At the Togo's meeting.

22 Q BY MR. GILBERT: And then -- and I may have misread this.
23 I -- I was just watching your testimony, and I thought that
24 when counsel asked you if you'd ever been disciplined by
25 Michelle that you kind of hesitated. Did you -- I mean was

611

1 there any thought to that or is the answer just no? I just
2 want to know. I didn't know if you hesitated.

3 A No, no, there's no thought to that.

4 MR. GILBERT: All right. Nothing further.

5 HEARING OFFICER KAUFMAN: Okay. Any further from the
6 Petitioner?

7 MS. NISPEROS: Nothing further.

8 HEARING OFFICER KAUFMAN: Okay. Thank you, Ms. Myers.

9 THE WITNESS: Okay.

10 HEARING OFFICER KAUFMAN: You may be excused. Please don't
11 discuss your testimony with anybody until the hearing the
12 closed.

13 THE WITNESS: Okay.

14 HEARING OFFICER KAUFMAN: Okay.

15 THE WITNESS: Thank you.

16 HEARING OFFICER KAUFMAN: Thank you. Let's go off the
17 record.

18 (Off the record at 10:33 a.m.)

19 HEARING OFFICER KAUFMAN: On the record.

20 Mr. Gilbert, please call your next witness.

21 MR. GILBERT: Candy Comandao.

22 HEARING OFFICER KAUFMAN: Please raise your right hand.

23 Whereupon,

24 CANDACE COMANDAO

25 having been duly sworn, was called as a witness herein and was

1 Q And currently, what is your job title?

2 A I'm a school -- I'm a router for school bus routes for the
3 school bus drivers.

4 Q Okay. Can you just -- the Hearing Officer's heard a lot
5 about what Durham does, but we haven't had anything about
6 routing. So if you could just kind of say and just explain
7 kind of what the job duties of a router are.

8 A I get information from our customers, the districts.
9 That's who we're contracted from. And it will come in by
10 school, equipment, like wheelchairs or harness students, and by
11 bell time and school. So that's how we start the process of
12 routing. There could be kids that can't ride with other kids
13 due to emotional problems, from hitting, spitting and kicking
14 and trying to get out of their seats, to wheelchair children
15 that can't talk, they may have to be reclined; they take two
16 spots on our buses. Nurses have to ride sometimes with our
17 students, ambulatory and wheelchair. So that's how -- we try
18 to do group transportation from those -- you know, those
19 parameters. Some kids cannot be in group transportation. So
20 that might break it up.

21 Q And is it fair to say, ma'am, then throughout the year --
22 it's not as if you route at the beginning of the year and then
23 you're done, right?

24 A Huh-uh.

25 Q "No?" And the only reason I said know is because the

614

1 court reporter can't take down "huh-uhs" and "uh-huhs." If you
2 could say --

3 A I'm sorry.

4 Q -- yes or no.

5 A Yes. Okay.

6 Q And so your job continues throughout the year, correct?

7 A Yes, sir.

8 Q Okay. Ma'am, were you, as a -- well, let me ask you this:

9 Before -- prior to being -- well, have you performed any other
10 duties other than routing for Durham School Services?

11 A Yes. I started as a school bus driver in 1989. A
12 wheelchair driver.

13 Q And how long, ma'am, did you perform those duties?

14 A Until '90 -- well, '95. I was -- became a router in 1993
15 and I had to do both duties, drive an a.m./p.m. route, did my
16 routing during the middle of the day and then come back in the
17 afternoon and finish the day's duties.

18 Q And -- okay. And, ma'am, as a router, were you eligible
19 to vote in the May 8, 2015 Union election at Durham School
20 Services Customer Service Center in Hayward, California?

21 A Yes.

22 Q Ma'am, do you know an employee by the name of Michelle
23 Dorton?

24 A Yes.

25 Q And who is Michelle Dorton?

1 A A dispatcher in operations.

2 Q Have you ever heard Ms. Dorton refer to herself as the
3 lead or head dispatcher?

4 A I don't know about her, but the -- we do -- all do, the
5 Company, the -- yes, I have.

6 Q Okay. Did you attend any Union meetings?

7 A Yes.

8 Q How many Union meetings?

9 A There were two.

10 Q At any time during those Union meetings, was the topic --
11 strike that. Let me -- let me back up for a a second.

12 At one point in time did you learn that the Company may
13 exercise its right to challenge the votes of Ms. Corley and
14 Ms. Dorton?

15 A At a meeting?

16 Q No. At some time did you learn that?

17 A Yes, I did learn that. Not at a meeting.

18 Q Okay. And so that's my next question.

19 A Okay. I'm sorry.

20 Q Well, no. It's fine. It's fine. I was trying to set
21 what we call a foundation. So I was just --

22 A Okay.

23 Q You're doing very well.

24 A I'm trying to use my CSI -- it's very close. It's scary.

25 Q Okay. And so at either of the Union meetings that you

1 attended, was the topic of the Company possibly challenging
2 Ms. Dorton or Ms. Corley discussed?

3 A No.

4 Q When, ma'am, did you learn that the Company might
5 challenge the votes of Ms. Corley or Ms. Dorton?

6 A Thursday night before the election.

7 MR. GILBERT: And I would just ask that the Hearing Officer
8 take administrative notice that the election was conducted on a
9 Friday, which was Friday, May 8th, 2015.

10 THE WITNESS: May 8th, yes.

11 HEARING OFFICER KAUFMAN: Okay. Granted.

12 Q BY MR. GILBERT: And so, ma'am, is it fair to say then
13 that the conversation where you first learned with the
14 challenges was on May 7, 2015?

15 A Yes.

16 Q Okay. And did you learn about the challenges during a
17 phone call with Mr. Dorton and Ms. Head?

18 A Yes.

19 Q And do you know -- strike that.

20 Prior to May 7th, 2015, had you made your mind up as to how
21 you were going to vote?

22 A Yes.

23 Q And how were you going to vote?

24 A I was a no.

25 Q And based on your conversation with --

617

1 A Can I say something? With an open mind. You know, I was
2 always a no. I listened to everything. But, yes, I was a no
3 vote.

4 Q And based on your conversation on May 7th, 2015 with
5 Ms. Dorton and Ms. Head, did you change your vote?

6 A Not at that day. Not at -- not until the next morning on
7 the way -- when I got up that morning.

8 Q But your decision -- was your decision to change your vote
9 based on the conversation?

10 A Yes.

11 Q And did you change your vote to a yes vote?

12 A Yes.

13 Q Ma'am, when -- did Ms. Dorton express frustration with the
14 Company's challenge of her -- or reserving the right to
15 challenge her vote?

16 A Frustration?

17 Q Let me ask you this --

18 A Okay.

19 Q -- what was her -- what was her emotion related to the
20 ability -- the Company's possible challenge of her vote, if
21 any, that you saw?

22 A It was very upset as well as Sherry and myself.

23 Q Okay.

24 A I don't know her exact emotion or feeling, but we were all
25 three upset.

1 Q When you were speaking with Ms. Dorton, that was in --
2 that was -- strike that. Can you just describe for the Hearing
3 Officer the call, how it took place, who was on the phone and
4 who was in person?

5 A I came into operations, this room, and there was a call on
6 speakerphone at Michelle's desk. And the person on the phone
7 is the other router named Sherry Head. And Sherry was very --
8 talking very loud and upset. And I said -- came in the room
9 and I said, "What is wrong with Sherry? What's going on?"

10 Q And I don't want to stop you but was Ms. -- was Ms. Dorton
11 there present physically?

12 A Yes.

13 Q Okay. Go ahead.

14 A And then Sherry said, "What did she say?" Something to
15 the effect. And Michelle said, "She doesn't know yet. We" --
16 "I haven't told her." And so I just sat down. I said, "What's
17 going on?" And that's when they told about the -- trying to --
18 what's the word? I always forget the word.

19 Q Well, let me ask --

20 A Contest their -- two people's votes; Darlene and
21 Michelle's. And I said, "What do you mean? How can that
22 happen?" I didn't know how you cannot have somebody vote in
23 America in an election, period. And so I was very upset. And
24 it just kept going around, "We don't know why they're going to
25 contest." I think maybe -- I don't even know if I knew about

1 the supervisory position allegation at that time. But I -- it
2 was just -- everybody was upset. And I had to go back to my
3 office and my desk in the back of the building and finish my
4 work so I could go home for the day. It was very draining and
5 exhausting, the whole -- the whole thing.

6 I -- my words in that -- I remember I said that it's very
7 scandalous and very -- I just didn't understand how that could
8 be -- happen for a vote. How they could set aside someone's
9 vote. So I didn't understand at that time about going ahead
10 and voting and then putting it in an envelope and sealing it
11 and putting it to the side. And we all voted at the -- we were
12 supposed to vote at 11:00 that day, on the 8th. And I come in
13 to work at 10:30 and at that time I cannot -- I was told that
14 we cannot talk to anybody in management about -- 30 minutes
15 prior to the election, we couldn't talk to anyone. So --

16 Q And I understand, Ms. Comandao. Who told you that?

17 A I didn't know that until I got to work that morning.

18 Q Yeah. But who told you that?

19 A I think Eileen Noonan.

20 Q Okay. Do you recall who -- specifically who it was or do
21 you think --

22 A Yeah. It was Eileen. She said, "We're not allowed to
23 talk to you guys before 30 minutes." And then it was like
24 10:35.

25 Q Okay. And --

1 A But the night before, after this -- the -- the
2 conversation, I just remember, you know, going back and doing
3 my work and I didn't talk to nobody. I couldn't talk to them
4 or meet or -- I had no one to talk to. So --

5 Q Okay.

6 A -- that's what happened that evening.

7 Q And, Ms. Comandao, throughout the process leading up to
8 the election, was Ms. Dorton vocal in her support of the Union?

9 A Yes.

10 Q And did Ms. Dorton keep you advised about meetings?

11 A I know the first meeting, yes, I was called at the time
12 and place, would I please attend. The second one, I don't know
13 if Michelle told me or not. It might have been Sherry.

14 Q Okay.

15 A And that was after work in the evening.

16 Q Okay.

17 MR. GILBERT: Nothing further.

18 HEARING OFFICER KAUFMAN: Cross-exam?

19 MS. NISPEROS: We might save some time if the Employer's
20 willing to stipulate that Michelle Dorton's not a 211
21 supervisor of Candy Comandao.

22 MR. GILBERT: So stipulated.

23 HEARING OFFICER KAUFMAN: Okay. That stipulation is
24 accepted.

25 THE WITNESS: What? Excuse me. What does that mean?

1 MS. NISPEROS: Oh, we just -- we just --

2 THE WITNESS: You're stipulating --

3 MR. GILBERT: We just stipulated that Michelle Dorton is
4 not your supervisor.

5 THE WITNESS: No.

6 MS. NISPEROS: Okay. It's one of those CSI things we do.

7 And if I can, just to be clear, I would want to just take a
8 moment to review and see if I have additional questions, but I
9 think that will cut through some of them.

10 MR. GILBERT: See, Candy, you were worried about this.
11 It's fun, right?

12 THE WITNESS: It is, yes. Yeah.

13 MR. GILBERT: We got -- we got these --

14 HEARING OFFICER KAUFMAN: It's okay. I'll clean it up
15 later. For the record, what's happening right now is some
16 water was just spilled. It's okay.

17 THE WITNESS: Luckily not on some document.

18 MS. NISPEROS: I have no further questions -- no questions.

19 HEARING OFFICER KAUFMAN: Okay. Ms. Comandao, can you
20 recall any other details about what was said in that
21 speakerphone conversation, the Thursday before the election?

22 THE WITNESS: Between my comments or -- I just remember --

23 HEARING OFFICER KAUFMAN: Statements made by anyone.

24 THE WITNESS: I just remember talking about why on earth
25 couldn't they vote. And -- and if they're supervisors -- I

622

1 don't understand that they're being supervisors. And I felt
2 that the Company should know if they're supervisors. And I
3 just was just blown away at the whole thing.

4 HEARING OFFICER KAUFMAN: Okay. Thank you.

5 Anything further from either side?

6 MR. GILBERT: Just -- I want --

7 Q BY MR. GILBERT: At point in time, ma'am --

8 MS. NISPEROS: Is there -- I'm -- never mind. Sorry. Go
9 ahead.

10 Q BY MR. GILBERT: At one point in time did Ms. Corley have
11 some temporary employees that were working for her?

12 A I believe so.

13 MR. GILBERT: Okay. Nothing further.

14 HEARING OFFICER KAUFMAN: Okay. Ms. Comandao, thank you
15 for your testimony today. You are excused. Please remember
16 not to discuss your testimony with anybody else until afternoon
17 the hearing closes.

18 THE WITNESS: Yes, ma'am.

19 HEARING OFFICER KAUFMAN: Okay. Thank you.

20 THE WITNESS: Thank you.

21 HEARING OFFICER KAUFMAN: And we can go off the record for
22 a moment.

23 (Off the record at 11:06 a.m.)

24 HEARING OFFICER KAUFMAN: We'll go on the record.

25 Mr. Gilbert, does the Employer have any further witnesses

1 to call?

2 MR. GILBERT: The Employer does not at this time have any
3 further witnesses. However, the Employer is still waiting the
4 production of the illegible document which counsel has
5 represented that she is making efforts to obtain. We have
6 agreed off the record that even a picture of it would suffice.
7 It could be e-mailed to us. And obviously the Employer still
8 reserves the ability, based on the production of that document,
9 to call additional witnesses depending on what the document may
10 or may not say. But subject to that, the Employer is resting,
11 yes.

12 HEARING OFFICER KAUFMAN: Okay. And, Ms. Nisperos, does
13 the Petitioner have a witness to call?

14 MS. NISPEROS: I need to confer with my client about that.

15 HEARING OFFICER KAUFMAN: Okay. Let's go off the record.
16 (Off the record at 11:14 a.m.)

17 HEARING OFFICER KAUFMAN: On the record.

18 Mr. Gilbert, we're back on the record. And I understand
19 that you want to move some exhibits into the record.

20 MR. GILBERT: Yes, ma'am. I would like to move for the
21 admission of what has been marked as Employer's Exhibit 33.
22 Employer's Exhibit 33 is a document that is dated October 8,
23 2013, that was provided to counsel by counsel for the Union, in
24 response to a subpoena issued to Ms. Stacy Alvelais. And the
25 document, as we noted on the record before, appears to

1 summarize or appears to constitute notes taken by Ms. Alvelais
2 regarding a grievance meeting. But a large portion of the
3 document is illegible. The Employer maintains that the
4 document goes to supervisory status, in that, it indicates that
5 Michelle directs employees in their work and assigns work to
6 employees. And the Employer, therefore moves for the admission
7 of Employer's Exhibit 33.

8 HEARING OFFICER KAUFMAN: Okay. And, Ms. Nisperos, any
9 objection to the admission of this document?

10 MS. NISPEROS: For the record, the Union objects on the
11 basis of relevance. Union's position is that any grievances or
12 complaints filed by existing Local 853 members, although they
13 were filed with the company, wouldn't go to -- they're not
14 relevant to supervisory status or any objectionable conduct
15 during the critical election period.

16 HEARING OFFICER KAUFMAN: Okay. At this time, I'm not
17 going to decide whether this document is going to be accorded
18 any weight. As Mr. Gilbert noted, it's kind of difficult to do
19 given that the document is illegible. But he at least has made
20 an argument that this document might tend to be relevant. So
21 I'm going to go ahead and allow it to be received into
22 evidence.

23 (Employer Exhibit Number 33 Received into Evidence)

24 HEARING OFFICER KAUFMAN: And I will note for the record
25 that I have asked the Union's attorney to provide a legible

1 copy of this document before we close the record. So we're
2 still working on getting that done.

3 Did you have another exhibit that you wanted to move into
4 evidence, Mr. Gilbert?

5 MR. GILBERT: Yes. The Employer also moves for the
6 admission of Employer's Exhibit 34, which, again, was produced
7 pursuant to Employer's subpoena issued to Ms. Alvelais by
8 counsel for the Union. It also appears to be notes pertaining
9 to a grievance meeting, which Michelle Dorton participated in.
10 And the document is relevant, in that, it indicates Michelle
11 questioning other individuals who are eligible to vote. And
12 Michelle also exhibiting concerns and behavior that is
13 consistent with supervisory status?

14 HEARING OFFICER KAUFMAN: Any objection, Ms. Nisperos?

15 MS. NISPEROS: The Union objects on lack of foundation and
16 the irrelevance of this document. These are notes taken by
17 someone who is not representing Ms. Dorton. They do not go to
18 any issues related to supervisory status. They are also not
19 reflecting of any conduct during the critical period that could
20 possibly be grounds for overturning election.

21 MR. GILBERT: I would just state for the record that, in
22 an off the record discussion, I asked counsel when the notes
23 pertained to and counsel said she didn't know. So I think it's
24 disingenuous to then put on the record that they don't pertain
25 to the critical period, because the notes are not dated. So I

1 MS. NISPEROS: This is --

2 HEARING OFFICER KAUFMAN: Thank you.

3 MS. NISPEROS: Okay. The Union would like to call Rodney
4 Smith.

5 HEARING OFFICER KAUFMAN: Mr. Smith, welcome back. Please
6 raise your right hand.

7 Whereupon,

8 RODNEY SMITH

9 having been duly sworn, was called as a witness herein and was
10 examined and testified as follows:

11 HEARING OFFICER KAUFMAN: Please state and spell your name
12 for the court reporter.

13 THE WITNESS: Rodney, R-O-D-N-E-Y, Smith, S-M-I-T-H.

14 DIRECT EXAMINATION

15 Q BY MR. GILBERT: Mr. Smith, what is your -- who is your
16 employer?

17 A Teamsters Local 853.

18 Q Okay. And can you tell us your job title with Teamsters
19 Local 853?

20 A Organizer.

21 Q Okay. Were you involved in organizing the Durham
22 administrative employees who were eligible to vote in the
23 election that took place May 8th, 2015?

24 A That is correct. Yes.

25 Q And were you the designated union -- one of the designated

1 union representatives to be responsible for that?

2 A Yes.

3 Q Did you ever designate Michelle Dorton to -- or did you
4 ever tell her that you wanted her to act on behalf Teamsters
5 Local 853?

6 A No.

7 Q And during -- in your efforts to -- related to the May 8th
8 -- the folks who are eligible to vote May 8th, did you have
9 direct contact with some of those -- at least some of those
10 workers?

11 A No.

12 Q Okay. And is it the case that they were able to contact
13 you directly of their own accord if they wanted to do that?

14 A That is correct.

15 Q Did you ever tell Michelle Durham that she should -- that
16 she was the person who was going to accept questions from the
17 workers who voted May 8th on behalf of Teamsters Local 853?

18 MR. GILBERT: I'm going to object to the leading nature of
19 the questions. There was no testimony being elicited. So it's
20 not rebuttal. If counsel wants to ask him what he told
21 Michelle Dorton on direct examination. But to ask these types
22 of leading questions is far afield from what we should be doing
23 on direct examination.

24 HEARING OFFICER KAUFMAN: Would you like to rephrase the
25 question, please?

1 MS. NISPEROS: Sure.

2 MR. GILBERT: And I would also object to the extent that
3 Mr. Smith -- this is somewhat cumulative. I mean Mr. Smith
4 testified already about his involvement, Ms. Dorton's
5 involvement. And I understand this is the Union's case in
6 chief. But I mean to the extent this is cumulative, I think
7 we're all trying to move forward. So I object. I have a
8 standing objection to the cumulative nature of the evidence.

9 HEARING OFFICER KAUFMAN: Okay, thank you.

10 Q BY MS. NISPEROS: Did you, at any time, communicate with
11 Michelle Dorton in your efforts to organize the administrative
12 employees who voted on May 8th?

13 A Yes.

14 Q During those communications, did you ever tell her that
15 she would be the person to receive questions or comments from
16 other workers on behalf of Teamsters 853.

17 MR. GILBERT: Again, objection.

18 THE WITNESS: No.

19 MR. GILBERT: Objection, leading. If the witness wants to
20 ask what he told Ms. Dorton, that's an appropriate question.

21 HEARING OFFICER KAUFMAN: I'm going to allow the question.
22 Go ahead.

23 MS. NISPEROS: So I'll repeat my question.

24 Q BY MS. NISPEROS: You testified that you did communicate
25 with Michelle Dorton. During your communications with Michelle

1 Dorton, did you ever tell her that she was the person that
2 should or that you wanted to receive communications from
3 workers who vote -- who were to vote on May 8th, on behalf of
4 Teamsters Local 853?

5 A No. At no time did I instruct Michelle or anyone else in
6 the appropriate bargaining unit to solicit cards or that they
7 were to designate a representative for Teamster 853. Excuse
8 me.

9 Q Okay. Did you have communications with other members who
10 were eligible to vote on May 8th?

11 A Yes.

12 Q Okay. Did you have -- ever have a meeting with the
13 workers who were eligible to vote on April 8th?

14 A Yes.

15 Q On April 8th, I believe you -- well, on April 8th, did you
16 pass out authorization cards or did you make -- let me ask this
17 this way. Did you make authorization cards available to the
18 workers who attended that April 8th meeting?

19 A Yes, I did. I gave each individual a authorization card.
20 That is correct. Yes.

21 Q Okay. And was Michelle Dorton present at that April 8th
22 meeting?

23 A Yes.

24 Q Okay. At any point during the April 8th meeting, did you
25 tell the workers who attended that they were all -- let me

1 rephrase. During the April 8th meeting, did you attempt to
2 pressure any of the workers to sign authorization cards?

3 A No. At no time did I pressure the workers. In actuality,
4 I told the ladies, the workers from the appropriate unit that
5 were present when I passed out the authorization cards, feel
6 free to fill out the authorization card if you choose to. If
7 you choose not to, no hard feelings. It's not a problem.

8 Q Okay. At any point during that April 8th meeting, did you
9 -- did Michelle pressure other workers in attendance to sign
10 authorization cards?

11 A Of course not. And if she attempted to -- I facilitated
12 the meeting. I'm the representative of 853. I don't let other
13 people that's in the appropriate bargaining unit or attempting
14 to be in a bargaining unit facilitate my meetings. I was in
15 charge. So I wouldn't let anyone else dictate or take control
16 of a meeting that I'm in charge of. So the answer is no.

17 Q Okay. Do you recall whether anyone else who attended that
18 meeting -- well, let me ask it this way. Did anyone else who
19 attended that April 8th meeting pressure or otherwise threaten
20 others in attendance to sign an authorization card?

21 A See, I wouldn't -- no. The answer is no. But, of course,
22 me being a representative for Teamster 853 -- so we already
23 have a process in place in regards to secret ballot elections.
24 So I wouldn't let anyone pressure their coworkers. Everyone
25 has a right. Either you can vote yes or no. And I explained

1 this at these meetings. In regards to April 8th, that was
2 explained as well. So you have a right to vote yes. You have
3 a right to vote no. It's a secret ballot election. It's
4 your -- it's protected by the NLRB. So it's your right. So
5 thank you.

6 Q Okay. And did you ever hear -- during this April 8th
7 meeting, if you recall, can you tell me whether or not Michelle
8 made a statement to anyone that they -- something like they
9 should keep their -- they should sign an authorization card to
10 keep their job?

11 A No.

12 Q Did you hear Michelle Dorton or -- did you hear Michelle
13 Dorton say they better sign this authorization card or else
14 they would lose their job?

15 A No.

16 Q Did you hear Michelle Dorton say that -- say any other
17 version of that kind of statement?

18 A No.

19 Q If someone had said at the meeting -- let me ask it this
20 way. If someone had made a statement to the effect that you
21 better sign this card in order to keep your job, would you have
22 understood that to be an accurate statement?

23 A No, that's an inaccurate statement.

24 Q Okay. So if you had heard a comment at the April 8th
25 meeting to the effect that you better sign this card to keep

1 Q Okay.

2 MS. NISPEROS: I think I'm done with questions.

3 HEARING OFFICER KAUFMAN: Any cross-exam?

4 CROSS-EXAMINATION

5 Q BY MR. GILBERT: Hello, Mr. Smith. How are you, sir?

6 A It's a beautiful day, sir.

7 Q Yes, sir. Can you tell me where the April 8th meeting
8 took place?

9 A Togo's -- I'm trying to think of the address.

10 Q In Hayward? It's fine.

11 A Yeah, Hayward.

12 Q Okay.

13 A Togo in Hayward.

14 Q Tell me -- maybe I've been once. But Togo's is a sandwich
15 shop; is that right?

16 A Yes, that is correct.

17 Q So how does it work? You go up and you order and then
18 they call your name and you go get your sandwich?

19 MS. NISPEROS: Objection to relevance.

20 HEARING OFFICER KAUFMAN: Can I get your response to that?

21 MR. GILBERT: Can I have some leeway to see -- I mean I've
22 asked two questions. Okay. This witness just testified he
23 didn't hear anything. And I'm trying to establish how the
24 process works.

25 HEARING OFFICER KAUFMAN: All right. I'll give you some

1 MR. GILBERT: What is the compound nature of the question?

2 Q BY MR. GILBERT: There was a two-minute period that you
3 were away from the people who were eligible to vote and didn't
4 hear what they said.

5 MS. NISPEROS: It's -- again, to form.

6 HEARING OFFICER KAUFMAN: Do you want to restate the
7 question?

8 MR. GILBERT: Do I want to? Not really, but I will.

9 HEARING OFFICER KAUFMAN: Please.

10 Q BY MR. GILBERT: Sir, was there a two-minute --

11 HEARING OFFICER KAUFMAN: In the interest of moving this
12 along.

13 Q BY MR. GILBERT: Was there a two-minute period where you
14 were not in the presence of the individuals who were eligible
15 to vote in the May 8th, 2015 election when you were at Togo's
16 on April 8th, 2015?

17 A So yes. I don't know if it's exactly two minutes, but
18 that's what I, you know, testified to.

19 Q Okay.

20 A But I don't know exactly.

21 Q And isn't it true then, sir, that you cannot testify as to
22 what was said by the people that were there who were eligible
23 to vote in the May 8th, 2015 election during that two-minute
24 period?

25 A No, that's true. I don't know what they said in that two-

1 minute period.

2 Q And so, therefore, isn't it true that, during that two-
3 minute period, it's possible that Ms. Dorton told the group
4 that if you don't sign a card, you can lose your job?

5 A The only problem about it is this. So I have
6 communication with the ladies. I've talked with them. Someone
7 would have told me about this. Someone would have told me that
8 Michelle threatened them to do something.

9 Q Do you want me to ask the question again?

10 A Yeah, please.

11 Q Isn't it possible that Ms. Dorton, during that two-minute
12 period, could have told the other individuals present that if
13 they don't sign a card, they can -- they could -- something to
14 the effect of whatever her -- whatever the testimony in the
15 record is about the comment, but something to the effect of if
16 you don't sign a card, you can lose your job?

17 A That is possible.

18 Q Okay. And, sir, was Shirley Myers present at that
19 meeting?

20 A Shirley Myers was present, yes.

21 Q Okay. And, sir, I'm going to --

22 MR. GILBERT: And I do not have a copy. I'm going to --
23 is it ER-35 now? I think it is.

24 THE COURT REPORTER: Yes.

25 MS. NISPEROS: I'm sorry. That's ER what?

1 talk about issues and concerns, and the ladies would have told
2 me. They were talking about working conditions and issues.

3 Q BY MS. NISPEROS: Okay. Thank you. And you testified
4 that you provided authorization -- you made authorization cards
5 available to the workers who attended the April 8th meeting, if
6 I understood correctly.

7 A Yes, that is correct.

8 Q When you were making the cards available, how did you make
9 those available? Did you ask Michelle Dorton to take them and
10 pass them out, or can you --

11 A No. I stood at the head of the table, as I testified
12 already, I stood at the table, I went around individually,
13 passed it out, the authorization cards. I had already passed
14 out my business cards when the ladies came in. I individually
15 passed out the authorization cards on April the 8th, 2015 to
16 everyone that was in attendance at the Togo's meeting in
17 regards to the Durham admin May the 8th election that was
18 coming up.

19 MS. NISPEROS: Okay. I have no further questions.

20 MR. GILBERT: Okay. One more question.

21 RECROSS-EXAMINATION

22 Q BY MR. GILBERT: Sir--

23 A Yes.

24 Q -- you said that they were all there for the May 8th
25 election that was coming up; is that true?

664

1 is Dalisai Nisperos, I'm the attorney for the Union, Local 853,
2 and I'm going to be asking you a couple questions today. If
3 you don't understand a question that I'm asking, just let me
4 know. If it's not clear, you let me know. Is that okay?

5 A Okay.

6 Q Ms. Dorton, who's your Employer?

7 A Durham School Services.

8 Q Okay. And where --

9 MR. GILBERT: I'm going to object to the extent that this
10 is redirect. I mean, all this stuff is in the record. We are
11 under a time crunch and I -- but we don't need any kind of
12 background information at this point.

13 HEARING OFFICER KAUFMAN: I understand. I think that's
14 reasonable. We are making our best diligent efforts to try to
15 close the record today, if at all possible --

16 MS. NISPEROS: Okay.

17 HEARING OFFICER KAUFMAN: -- so --

18 MS. NISPEROS: Sure.

19 HEARING OFFICER KAUFMAN: Thank you.

20 Q BY MS. NISPEROS: You are employed at Durham's Hayward
21 Customer Service Center, right?

22 A Yes.

23 Q When you were hired, what was your job title?

24 A School bus driver.

25 Q Did your job title change to dispatcher at some point?

- 1 A Yes.
- 2 Q Okay. How long have you been working as a dispatcher?
- 3 A Since '94. No, I'm sorry, I'm sorry, '98.
- 4 Q And in 1994 and '98, to the best of your recollection,
- 5 your title was dispatcher, it was not lead dispatcher, right?
- 6 A No, it wasn't.
- 7 Q Okay. Do you have -- I'm sorry. At the Hayward Customer
- 8 Service Center, do you have a direct supervisor?
- 9 A Yes.
- 10 Q Who is that direct supervisor?
- 11 A Sandra Wilson.
- 12 Q And I believe her title is supervisor of operations, is
- 13 that right?
- 14 A Yes.
- 15 Q Okay. Have you ever reported to someone named Ron Mahler?
- 16 A Yes.
- 17 Q And he's the general manager, right?
- 18 A Yes.
- 19 Q Okay. Do you have something in front of you that is
- 20 labeled Employer Exhibit 3? Can you find that in front of you?
- 21 A Yes.
- 22 Q Okay. And do you see the label at the top, it says
- 23 request for time off?
- 24 A Yes.
- 25 Q Okay. You're familiar with this form or document?

1 Q Do you recall any occasion between -- in the period
2 January 1, 2015 until May 8, 2015, where you might have used
3 the phrase, job security or something like that with Shirley?

4 A Yes. One day I was sitting in the driver's break room.
5 And Shirley walked in. And she asked me why did I want the
6 Union. I told her for me, it's job security.

7 Q Okay. And can you tell the Hearing Officer whether there
8 was anyone else in the room with you at that time that you were
9 talking with Shirley?

10 A There was a driver that had walked in, but then they
11 walked out.

12 Q Okay. So when you used the phrase job security, was it
13 just you and Shirley?

14 A Yes.

15 Q Okay. And that other person that walked in and walked
16 out, as far as you know, did they -- were they in the room when
17 you guys were talking?

18 A They could have been.

19 Q Like for the whole conversation?

20 A No.

21 Q Or --

22 A They were in and out.

23 Q Okay. And was that person somebody that was eligible to
24 vote on May 8th?

25 A No.

703

1 Q And at any point between January 1, 2015 or May 8, 2015,
2 did you tell anyone else who was eligible to vote that they
3 should vote for the Union in order to avoid losing their jobs?

4 A No.

5 Q Did you ever tell anyone who became eligible to vote on
6 May 8th that they should sign a Union authorization card in
7 order to avoid losing their job?

8 A No.

9 Q At any time between January 1, 2015 and May 8, 2015, if
10 you recall, can you tell the Hearing Officer whether the
11 company ever had mandatory meetings with you and other workers
12 eligible to vote on May 8th?

13 A Yes, they did.

14 Q Okay. And did that happen on one occasion or more than
15 one occasion?

16 A I think it was at least three times.

17 Q Okay. Do you recall the physical location where these
18 meetings took place?

19 A It was the Hayward service center and in the training
20 room.

21 Q In the training room? Is that what you said?

22 A Uh-huh.

23 Q Okay.

24 A Yes.

25 Q So they were on the Durham premises?

1 A Yes.

2 Q And can you tell the Hearing Officer, if you recall, who
3 from management -- well, was there anyone from Durham
4 management at those management meetings?

5 A Yes.

6 Q Okay. And just so it's clear. At the meetings, did the
7 company talk about the Union --

8 A Yes.

9 Q -- or unionizing? Okay. And do you recall who from
10 management or the company was at those meetings?

11 A Ron, Sandra, Jeremy, Ilene, Winnie and I believe that was
12 it from management.

13 Q Okay. Was there ever somebody named Roxanne at any of
14 these meetings?

15 A Yes, Roxanne from Livermore was there.

16 Q And do you -- and who is -- Well, I'll come back. Do you
17 recall whether anyone named Todd from management was at any of
18 these meetings?

19 A Yes, he was at one.

20 Q And do you recall whether anybody named Bob Ronsdale was
21 at any of these mandatory meetings?

22 A He was at two.

23 Q Okay. And can you tell the Hearing Officer -- I think we
24 know that Ron Muller -- his title. We know Sandra's title.

25 Who is Jeremy?

1 A He's a maintenance supervisor.

2 HEARING OFFICER KAUFMAN: And last names, if you can
3 provide them, please.

4 MS. NISPEROS: Right.

5 THE WITNESS: Escobar. Jeremy Escobar.

6 Q BY MS. NISPEROS: And can you tell -- do you know the last
7 name of Ilene?

8 A Noonan (phonetic).

9 Q And can you tell the Hearing Officer what Ilene Noonan's
10 job title is, if you know?

11 A She's a training supervisor.

12 Q And do you know Todd's last name?

13 A No.

14 Q Okay. Do you know what his title is?

15 A I think he's the regional manager.

16 Q Okay. And you mentioned, I believe, Bob Ronsdale. Is
17 that right?

18 A Yes.

19 Q Do you know what his title is?

20 A I believe he's vice president. I'm not for sure.

21 Q Do you understand him to be someone from management, who
22 is onsite at the Durham Hayward customer service center?

23 A Yes.

24 Q And can you tell the Hearing Officer if you recall, what
25 things were -- was management saying about the Union or

1 unionizing at these meetings?

2 A They were saying that -- "How did it get to this point?

3 The Union can't promise you guys -- can't get you a good

4 contract." And that, "You should have come to us." And that,

5 "You don't need a third party speaking for you. Why do you

6 want to pay Union dues?" Things like that.

7 Q Do you recall if there were any comments made about --

8 MR. GILBERT: I'm going to object to this line of

9 questioning in that we're now evading into a C case here or

10 we're trying to try a C case in our case proceeding, which in

11 every Hearing Officer's guide and in all NLRB procedures and

12 manuals is inappropriate. If there's a question that goes to

13 supervisory status, that's fine. But we're getting into now

14 allegedly what was said or not said by members of management

15 regarding the Union. I think it's -- again, I'm worried about

16 we're trying to get evidence for a C case.

17 HEARING OFFICER KAUFMAN: I'm going to overrule the

18 objection, because I think this line of questioning is relevant

19 in -- because a factor when you're looking at supervisory pro-

20 Union conduct is whether it was undermined by the Employer's

21 conduct. So I think it's relevant to show that and I'm going

22 to allow it.

23 MS. NISPEROS: Okay.

24 Q BY MS. NISPEROS: At these meetings, at any of these

25 meetings, do you remember anyone from management referencing

1 giving --

2 MR. GILBERT: I'm going to object to the leading nature.
3 If she wants to ask the witness what was said at the meetings,
4 that's fine. But when we're just going to start talking about
5 what was referenced, now we're leading the witness. I mean,
6 the question is, "What do you recall being said?"

7 HEARING OFFICER KAUFMAN: Ms. Nisperos, can you rephrase
8 the question?

9 MS. NISPEROS: Sure.

10 Q BY MS. NISPEROS: So I believe you've mentioned getting a
11 fair contract, Union dues and a couple other things. What
12 other topics or what other things did the management
13 representatives talk about at these meetings?

14 A They kind of -- it was the same thing in each meeting.

15 Q Okay. Was -- do you know whether there was any additional
16 references to what you would end up with or deals or anything
17 like that?

18 MR. GILBERT: Object to the leading nature of the
19 question. She already asked the witness what was said.

20 HEARING OFFICER KAUFMAN: Can you rephrase the question?

21 MS. NISPEROS: Sure.

22 Q BY MS. NISPEROS: Do you recall whether there was any
23 references to whether your job --

24 MR. GILBERT: Objection. This is --

25 Q BY MS. NISPEROS: -- terms and conditions --

708

1 MR. GILBERT: -- leading. This absolutely leading. I
2 mean the question is --

3 MS. NISPEROS: It's not leading.

4 MR. GILBERT: -- "What do you," -- yes, it is. The
5 question is, "What do you recall being said at the meeting?"
6 The witness has answered the question. Obviously there's
7 something else you'd like her to say and now you're trying to
8 lead her to saying that. That's inappropriate. That's an
9 objectionable -- I object to the form of the question as
10 leading.

11 HEARING OFFICER KAUFMAN: Can you repeat your question?

12 MR. GILBERT: No, but once the question --

13 MS. NISPEROS: Whether there was anything about --

14 HEARING OFFICER KAUFMAN: For me.

15 MS. NISPEROS: -- terms and conditions of employment.

16 HEARING OFFICER KAUFMAN: I'm sorry. Can you say the
17 question again?

18 Q BY MS. NISPEROS: Do you recall whether there were
19 statements about your, I think job conditions or terms and
20 conditions is what I said.

21 HEARING OFFICER KAUFMAN: Okay. I think that's vague
22 enough that I'm going to go ahead and allow it.

23 Q BY MS. NISPEROS: Did you understand the question?

24 A Okay, now can you repeat it to me?

25 Q Can you -- if you recall, can you tell the Hearing Officer

1 whether management made statements relating to your job
2 conditions? Your job generally?

3 A Let me think. I can't recall.

4 Q And what did you understand to be the message from
5 management during these meetings?

6 A That they didn't want us to go Union.

7 Q Were there other things that were said at the meetings
8 that gave you that impression?

9 A Just the same things that they were saying. That, "Let us
10 work with you." And Ron had -- at one of the meetings, he told
11 us that if -- no, that was the one before. He brought out the
12 handbook saying that he would have to follow the rules if -- go
13 by the contract if he -- if we voted in the Union. And it was
14 just the same thing repeated, you know, each meeting.

15 Q Do you recall anything in particular being said at the
16 first meeting? From any management folks, just so my
17 question's clear.

18 A Nothing but, "Let us work with you." And Karena, she had
19 said that, "How did it get to this point?" And I said, "Well,
20 we gave you guys six months and you never came back and had a
21 meeting with us or anything."

22 Q I don't think you mentioned Karena. Who is -- do you
23 know, her last name?

24 A No, I don't. But she's from HR, I believe.

25 Q Do you recall anything in particular being said by

710

1 management at the following meeting, after the first?

2 A The same things.

3 Q And when you say the same things, you're referring to --
4 what are you referring to?

5 A "Why do you want to pay Union dues? Why do you want a
6 third person to speak for you? We can work this out ourselves.
7 We don't need a third person."

8 Q Did you understand -- what, if anything, was the company's
9 message about your decision to go Union?

10 A They didn't want it.

11 Q Okay. And we talked a little bit about who from
12 management was at these meetings. Do you recall who of the
13 Hayward customer service staff eligible to vote on May 8th was
14 present at the -- any of these meetings?

15 A Yes, it was Adela, Darlene, Candy, Sherry, Shirley and
16 myself.

17 Q Now, do you recall whether each of these people, the staff
18 was present at every single meeting?

19 A I can't recall if they were -- all of them was there at
20 that -- at every meeting, but the majority, yes.

21 Q And can you tell the Hearing Officer, if you recall, how
22 long these mandatory meetings lasted?

23 A About an hour maybe.

24 HEARING OFFICER KAUFMAN: Can we try to narrow down the
25 dates?

711

1 MS. NISPEROS: Sure.

2 Q BY MS. NISPEROS: Do you recall approximately in what
3 month -- let's start with the month. In what month did the
4 first meeting occur? Do you know? Do you recall?

5 A I think it could have been the end of April, first week in
6 May. It was before the election.

7 Q And do you know or do you recall whether the meetings
8 started before or after the petition for election was filed?

9 A The meetings started after.

10 Q Okay. So I'm just going to refer you to Employer 21.
11 This should move faster, because you should have a packet up
12 there with -- a more ordered packet. It has a stack of --
13 looks like this -- it's white photocopies. Do you have that
14 with you?

15 A Yes.

16 Q And I was asking you some questions about these forms. I
17 believe we discussed Monica Ruiz. And there should be one
18 labeled Alicia Jones, which I believe we discussed --

19 A Yes.

20 Q -- on Friday. Do you remember talking about that one?

21 A Yes.

22 Q Do you recall talking about Eve Ashley? I'll just --
23 we'll go through. So if you're looking at Employer Exhibit 21,
24 there's a form that says Eve Ashley. Do you know who Eve
25 Ashley is?

1 THE WITNESS: I don't know what Sandra takes. I don't --

2 HEARING OFFICER KAUFMAN: Wait. We're all talking over
3 each other and I can't hear Ms. Nisperos. You -- objection
4 relevance?

5 MS. NISPEROS: Objection to relevance.

6 HEARING OFFICER KAUFMAN: Can you please explain the
7 relevance of the question? Whether Sandra Wilson takes a
8 lunch.

9 MR. GILBERT: Yes, because there's other explanations for
10 Sandra not being there, other than she's off for two days.

11 HEARING OFFICER KAUFMAN: Okay. All right. Go ahead.

12 THE WITNESS: Repeat your question.

13 Q BY MR. GILBERT: Does Sandra ever leave the facility in
14 the middle of the day?

15 A Rarely.

16 Q It happens, though?

17 A Yes.

18 Q Okay. Again, so how is it, ma'am, that you're able to
19 testi -- have you told me about that? Have you told me every
20 reason, every basis for your position that Sandra was off for
21 two days when EX-22 was submitted?

22 A I told you what I know, is that Maria came to me. And she
23 didn't have the proper time off slip, because the office didn't
24 have any. And she asked me to sign this so dispatch would know
25 that she turned this in. And San -- and she said, "Sandra

749

1 MS. NISPEROS: Okay. I'm requesting to move it into
2 evidence after -- at the appropriate time.

3 THE WITNESS: Okay.

4 Q BY MR. GILBERT: And so, ma'am, did you attend a meeting
5 at Applebee's with the Union or Union representative?

6 A Yes.

7 Q And I will represent to you that there was testimony that
8 those notes are pertaining to the meeting at Applebee's; isn't
9 that --

10 A These are notes from whom?

11 Q Mr. Bender.

12 A Okay.

13 Q Ma'am, your testimony, again, is that the first time you
14 learned that your vote was being challenged was the night
15 before the election, correct?

16 A Yes.

17 Q And the meeting at Applebee's didn't occur the night
18 before the election; did it?

19 A No.

20 Q In fact, do recall how -- in proximity to the election,
21 when the meeting at Applebee's occurred?

22 A From the date I hear, you're saying April the 21st. I
23 don't know exactly what date it was that we went to Applebee's.

24 Q And I'm not trying to be difficult with you. I know it
25 probably seems that way, but there was some discrepancy about

750

1 the dates, so I'm not -- I'm trying not to use the date. So
2 I'm just -- that's why I didn't use the date. And so, I'm just
3 -- was it a week before the vote, two weeks; if you recall?

4 A I'm thinking that it could have been the end of -- it
5 could have been the end of April to the first week in May. I'm
6 not for sure.

7 HEARING OFFICER KAUFMAN: If it helps you, there's a
8 calendar on the wall over here.

9 THE WITNESS: I'm bad with dates. I don't -- I can't
10 recall what date it was.

11 HEARING OFFICER KAUFMAN: Do you remember what day of the
12 week it was?

13 THE WITNESS: It could have -- I believe it was a Thursday
14 or a Friday.

15 Q BY MR. GILBERT: I'm going to -- ma'am, I'm going to hand
16 you -- I'm going to show you what's been marked previously as
17 Employer's Exhibit 2. I think it might refresh your
18 recollection, if you want to refer -- I think it's the third or
19 fourth page of Employer's Exhibit 2.

20 I'll represent for the record, it's a series of text
21 messages exchanged between Ms. Dorton and Mr. Smith. And,
22 ma'am, does that document indicate that there was going to be a
23 meeting on Thursday, the 30th of April?

24 A It says that, yes.

25 Q Okay. And I'm asking you. It may not, but does that

1 refresh your recollection as to when the meeting could have
2 occurred?

3 A Yes.

4 Q Okay. And so, ma'am, if the Union's business agent has
5 indicated in writing in those notes that he discussed with you
6 on the night of the Applebee's --

7 MS. NISPEROS: Objection.

8 Q BY MR. GILBERT: -- meeting --

9 MS. NISPEROS: Leading.

10 MR. GILBERT: -- leading.

11 MS. NISPEROS: Assumes facts not in evidence.

12 HEARING OFFICER KAUFMAN: Overruled.

13 MS. NISPEROS: Foundation.

14 Q BY MR. GILBERT: Okay. Again, if the Union's business
15 agent's notes reflect that on the night of the Applebee's
16 meeting he discussed with you and everyone else in attendance
17 the fact that your vote was going to be challenged, those notes
18 would be incorrect; is that an accurate statement?

19 A We didn't discuss anything about a challenge at
20 Applebee's.

21 Q Correct. And so, again, those notes that are in front of
22 you, marked as Exhibit 27, I believe, those notes are
23 incorrect, right?

24 MS. NISPEROS: Objection. This is mischaracterizing the
25 exhibit.

1 HEARING OFFICER KAUFMAN: I'm going to overrule that
2 objection. She's just testified what her recollection of the
3 date of the meeting was, but, quickly, I need some
4 clarification for the record. Employer 2, which I believe is
5 what you just showed to her, has the location redacted in the
6 text messages, and it was --

7 MS. NISPEROS: I believe it was the Union --

8 HEARING OFFICER KAUFMAN: -- the Union exhibit --

9 MS. NISPEROS: Uh-huh.

10 HEARING OFFICER KAUFMAN: -- has the location, correct?

11 MS. NISPEROS: Correct.

12 MR. GILBERT: Thank you. I apologize.

13 HEARING OFFICER KAUFMAN: And I think the reporter has a
14 copy, but I was never given a copy of the unredacted version
15 and is that what you were looking at?

16 MR. GILBERT: No, she was not. I showed her the
17 Employer's, but, again, I --

18 MS. NISPEROS: We may have substitute Union 2 for Employer
19 2.

20 HEARING OFFICER KAUFMAN: I'm showing that Union Exhibit
21 2, was an unredacted version of Employer Exhibit 2, but I
22 didn't receive a copy of that.

23 MS. NISPEROS: Yes.

24 HEARING OFFICER KAUFMAN: I know one was given to the
25 court reporter.

1 MS. NISPEROS: And the witness' version is redacted or
2 unredacted?

3 MR. GILBERT: The version that I showed the witness was
4 redacted. I did not -- I'm not saying I didn't get it, but I
5 did not, at the time, have in possession -- in my possession a
6 copy of the unredacted. I may have it; I just don't believe I
7 do.

8 HEARING OFFICER KAUFMAN: Let's go off the record for a
9 moment.

10 (Off the record at 11:34 a.m.)

11 HEARING OFFICER KAUFMAN: Okay.

12 Q BY MR. GILBERT: Now, ma'am, I've handed you what's -- or
13 counsel's handed you what's been marked as Union Exhibit 2,
14 which I'll represent for the record has the location of the
15 meeting that in the text messages, at least, is referenced as
16 appearing on April 30th. And does that text message indicate
17 the meeting was at Applebee's?

18 A Yes.

19 Q Okay. And so, again, I just want to make sure that the
20 record is clear. To your recollection -- to your knowledge, at
21 no time at Applebee's did the Union or anyone on the Union's
22 behalf, including Mr. Bender, advised you that your vote had
23 been challenged by the Employer?

24 A No.

25 Q Is that true?

1 A That's true.

2 Q Okay. Ma'am, as you look at Employer's Exhibit 27, is
3 there anything else about those notes that are incorrect?

4 MS. NISPEROS: Objection. Foundation.

5 Q BY MR. GILBERT: Were you at the meeting?

6 HEARING OFFICER KAUFMAN: That -- yeah.

7 THE WITNESS: Yes.

8 Q BY MR. GILBERT: You -- okay.

9 HEARING OFFICER KAUFMAN: You can go ahead and answer the
10 question.

11 THE WITNESS: Number three is incorrect.

12 Q BY MR. GILBERT: Anything other than number three on the
13 document that's been marked as Employer's Exhibit 27?

14 A No, nothing else.

15 Q Let me see that briefly, ma'am. Ma'am, the conversation
16 that you had with Ms. Myers regarding the term job security,
17 that, correct me if I'm wrong, occurred at the facility,
18 correct?

19 A In the driver's break room, yes.

20 Q And that's the only such conversation you had with Ms.
21 Myers?

22 A No, I had one other.

23 Q When your counsel asked you if you recalled having any
24 conversation with Ms. Myers about job security, you only
25 mentioned once -- one, correct?

1 A I mentioned -- she said job security. One meeting was
2 about job security, and then we had another. Shirley had
3 called me in her office another time.

4 Q Okay. And so, I'm concerned with any conversations that
5 she had with you about job security. Is that the only one that
6 you had with her about job security, that one in the break
7 room?

8 A In the break room and, again, in a group. We -- it was
9 like three or four of us at a time at different occasions, and
10 we talked about job security.

11 Q Okay. I'm confused now. So I -- I thought your counsel
12 asked you if you had any conversations about job security with
13 Ms. Myers, and you testified about a meeting in a break room.

14 A Yes.

15 Q So now you're testifying there's more conversations with
16 Ms. Myers?

17 A In a group of us at different times, in passing, we would
18 have conversations --

19 Q Okay. Is --

20 A -- and Shirley was present.

21 Q -- is there anything that you can recall that you said
22 during those conversations?

23 A I always told them, speaking for me, it was job security.
24 We don't know which direction the job was going to go in, and
25 we all said different things like that.

756

1 Q And was this after the cards were signed, ma'am, that you
2 had these conversations?

3 A Yes.

4 Q Okay. And, again, just -- the card signing that took
5 place in 2015, is that the card signing that involved the
6 unnamed driver?

7 A Yes.

8 Q And was that different than the card signing that occurred
9 in 2014? Meaning was there was unnamed driver in 2014?

10 MR. GILBERT: Objection to relevance.

11 THE WITNESS: I can't remember how we -- how the cards
12 came about --

13 HEARING OFFICER KAUFMAN: I'm going to allow it.

14 THE WITNESS: -- in 2014. I don't know.

15 Q BY MR. GILBERT: Ma'am, during your testimony -- if you
16 look up on the lectern, there should be at least one example --
17 and I will just refer to Ex 14, for example -- which is Karen
18 -- well, let's -- yeah, well I can't read it -- Jaczinsky,
19 J-A-C --

20 A Karen Jaczinsky.

21 Q Do you know how to spell that, ma'am? If you look at --

22 A I think it's J-A-C -- well, I don't even see it. I'm not
23 sure.

24 HEARING OFFICER KAUFMAN: Which exhibit are you referring
25 to?

1 MR. GILBERT: 14.

2 MS. NISPEROS: I -- and the name that you show in 14 is

3 who?

4 MR. GILBERT: Is it Karen --

5 MS. NISPEROS: Elida Welch.

6 MR. GILBERT: -- what was that?

7 MS. NISPEROS: Elida Welch.

8 MR. GILBERT: Is that 14 in the packet or?

9 MS. NISPEROS: Oh, are you -- no, I'm looking at

10 Employer's Exhibit 14.

11 THE WITNESS: Is it Exhibit 14?

12 MR. GILBERT: I thought it was. Okay. Let me --

13 THE WITNESS: No.

14 MR. GILBERT: -- let me -- I apologize. I apologize.

15 Let's -- let me find another one. Obviously -- okay. Yes, I

16 have it. Thank you very much, counsel. Exhibit 14 is Elida

17 Welch. Thank you, counsel.

18 THE WITNESS: Okay.

19 MS. NISPEROS: I'm sorry; we're looking at the packet,

20 which is Exhibit --

21 MR. GILBERT: No, it's actually 14, which is Elida Welch.

22 HEARING OFFICER KAUFMAN: It's the exhibit -- Employer

23 Exhibit 14.

24 MS. NISPEROS: Okay.

25 Q BY MR. GILBERT: And there was some questions -- you

1 answered some questions from you counsel about the handwriting
2 at the top. Do you recall that?

3 A Yes.

4 MR. GILBERT: And I will just represent for the record
5 that the handwriting at the top of the request for time off is
6 marked as Exhibit -- the front page of Exhibit 14, "Status must
7 leave by seniority," correct?

8 A Yes.

9 Q Do you know whose handwriting that is?

10 A Mine.

11 Q And why did you write that at the top?

12 A The general manager at the time, Paul Bracco, asked me to
13 write that at the top of the time out slip and make copies,
14 because the drivers was taking their buses home.

15 Q Okay. And when was Mr. Bracco there?

16 A Last year, I think, 2014.

17 Q Do you recall the time -- I mean when the first organizing
18 attempt took place, was Mr. Bracco at the facility? It was Mr.
19 Muller, correct?

20 A No, Ron came over after it had began. Ron was not the GM
21 in 2014.

22 Q When -- if you know, when the Union withdrew its petition
23 in 2014, was Mr. Muller the GM?

24 A He became GM after it was filed and like a week or two
25 before the election --

1 Q Okay.

2 A -- he was brought over.

3 Q Okay. And so, at the time the petition was withdrawn --
4 when it ended, Mr. Muller was the GM, correct?

5 A Yes.

6 HEARING OFFICER KAUFMAN: I'm sorry, which unit --

7 Q The organizing in 2014.

8 HEARING OFFICER KAUFMAN: -- was this petition for?

9 MR. GILBERT: What was that?

10 HEARING OFFICER KAUFMAN: Which unit was this petition
11 for?

12 MR. GILBERT: The same unit.

13 MS. NISPEROS: Could counsel provide some background about
14 time frame? I think that's -- it may be unclear.

15 HEARING OFFICER KAUFMAN: The unit at issue in this
16 hearing?

17 MR. GILBERT: Yes.

18 HEARING OFFICER KAUFMAN: Okay.

19 Q BY MR. GILBERT: I mean, Ms. Dorton, isn't it true that in
20 2014, the same staff members filed a petition, and then decided
21 to withdraw it prior to the election?

22 A Yes.

23 Q And that occurred approximately September of 2014?

24 A It was September 4th or 5th.

25 Q Okay. And how -- was Mr. Bracco -- is that his name?

1 A Paul Bracco.

2 Q Was he the GM before Mr. Muller?

3 A Yes.

4 Q And when you made copies of the request for time off slip
5 with the language at the top said, "must leave by seniority,"
6 what did you do with those copies?

7 A They were either in dispatch or Paul would have some.

8 Q Okay. Ma'am, have you ever seen Sandra in possession of a
9 document that says, "must leave by seniority?"

10 A I don't know if she have any or not.

11 Q Okay. Did you ever give any to her?

12 A Sandra came way after this was created.

13 Q Understood.

14 A So I don't know if I gave it to her or not.

15 Q Do you have any recollection of giving Sandra any?

16 A I don't recall.

17 Q And we stipulated that the mere fact that this language at
18 the top of this document doesn't, in and of itself, indicate
19 that you approved it, but would you agree with me, ma'am, that
20 the language is at the top of the request for time off leave
21 that says, "must leave by seniority," that the request for time
22 off, obviously, was provided to the driver by dispatch?

23 A No, the time off was not provided by dispatch.

24 Q No, no, the time -- request for time off slip was provided
25 to the driver by dispatch.

776

1 Q And, again, home to school is a term that's used in the
2 industry to refer to running a route, correct?

3 A Yes.

4 MR. GILBERT: Nothing further. Oh, no, one more question.

5 Q BY MR. GILBERT: Anyway, have you ever been made aware
6 that Paula -- do you know Paula Moncado?

7 A Uh-huh, yes.

8 Q Has anybody ever told you that Paula Moncado filed a
9 grievance against you?

10 A No.

11 MR. GILBERT: Nothing further.

12 HEARING OFFICER KAUFMAN: Anything further?

13 MS. NISPEROS: No.

14 HEARING OFFICER KAUFMAN: Ms. Dorton, thank you for your
15 testimony. You are excused.

16 THE WITNESS: Thank you.

17 HEARING OFFICER KAUFMAN: Please remember not to discuss
18 your testimony with anyone until the hearing is over.

19 THE WITNESS: Okay.

20 HEARING OFFICER KAUFMAN: Okay. Thank you very much.

21 THE WITNESS: Okay.

22 MR. GILBERT: Thank you, Michele.

23 HEARING OFFICER KAUFMAN: Mr. Gilbert, do you -- well, Ms.
24 Nisperos, do you have any further witnesses?

25 MS. NISPEROS: Not at this time.

EMPLOYER'S EXHIBIT

2

●●○○○ Verizon

1:55 PM



Messages (2)

Michelle

Details

Text Message

Wed, Apr 1, 11:17 AM

Hi Rodney this is Michelle
anything yet?

One issue, Elaine Neumann isn't
the contact any longer. To
whom should I send the
petition ?

Ron mahler

Thanks

Ok

Thu, Apr 2, 4:34 PM

Michelle,

I'm waiting for the National
Labor Relations Board to
confirm that the petition has
processed.



Text Message

Send

Ex-2

●●○○○ Verizon

1:54 PM



Messages (2)

Michelle

Details

Ron mahler

Thanks

Ok

Thu, Apr 2, 4:34 PM

Michelle,

I'm waiting for the National Labor Relations Board to confirm that the petition has processed.

The Board has been overwhelmed do the rules change regarding secret ballot elections.

Thanks,
Rodney

Thu, Apr 2, 6:17 PM

Thanks Rodney for the update



Text Message

Send

●●○○○ Verizon

1:55 PM



< Messages (2)

Michelle

Details

Thanks

Ok

Thu, Apr 2, 4:34 PM

Michelle,

I'm waiting for the National Labor Relations Board to confirm that the petition has processed.

The Board has been overwhelmed do the rules change regarding secret ballot elections.

Thanks,
Rodney

Thu, Apr 2, 6:17 PM

Thanks Rodney for the update

Mon, Apr 13, 11:56 AM



Text Message

Send

●●○○○ Verizon

1:54 PM



Messages (2)

Michelle

Details

Good morning Rodney any
news yet

Mon, Apr 13, 2:14 PM

Hi Rodney everyone is
wondering have the filing gone
through yet?

Wed, Apr 15, 2:47 PM

Hi Rodney can't talk right now
but Shirley title is office
administrator

Fri, Apr 24, 2:56 PM

Hi Rodney we will be available
on Monday at 6:30 I will call you
with meeting place

Hi Michelle,

Great news, please let me
know.

Thanks



Text Message

Send

●●○○○ Verizon

1:54 PM



Messages (2)

Michelle

Details

I will have a great weekend!!

You as well..

Mon, Apr 27, 1:27 PM

Hi Rodney we can meet on
Thursday at 6:30 at
at .

Mon, Apr 27, 4:54 PM

Yes, Thursday April 30th at
6:30pm

Thanks Rodney

Thu, Apr 30, 6:46 PM

Rodney we will be leaving in ten
minutes

Tuesday 7:06 PM

Michelle, is it ok to call you
now ?



Text Message

Send

EMPLOYER'S EXHIBIT

3



REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS
			VACATION
			PERSONAL
			OTHER

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE			
END DATE			
NUMBER OF DAYS TAKEN			

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: _____

DATE: / /

59.03.0350.06(12/01)

EMPLOYEE

PAYROLL

DURHAM
SCHOOL SERVICES

REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS
			VACATION
			PERSONAL
			OTHER

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE			
END DATE			
NUMBER OF DAYS TAKEN			

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: _____

DATE: / /

59.03.0350.06(12/01)

SUPERVISOR

EMPLOYER'S EXHIBIT

4



REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	GSC NO.	REASONS	✓
100005	Murthy 12/08/05		VACATION	
			PERSONAL	
			OTHER	

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	9/20/12		
END DATE			
NUMBER OF DAYS TAKEN	I will do it!! Working hard for you Jim O'Leary		

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY:

DATE 9/4/12

99.03.0360.06(12/01)

SUPERVISOR



REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS
54425	Bhar Sanjeeb		VACATION
			PERSONAL
			OTHER

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	9-10-2012		
END DATE	9-10-2012 A.S.		
NUMBER OF DAYS TAKEN	9-10-2012 A.S. PM		

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: W. J. Lee DATE 5/20/00

99.03.0360.06(12/01)

SUPERVISOR



Cover my P.M.

REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS
11007	MARIO JOHNSON	13	VACATION
			PERSONAL
			OTHER

Doctor
Appt.

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	9-17-12		
END DATE	9-17-12		
NUMBER OF DAYS TAKEN			

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY:

Michelle Foster

DATE

9/14/12

99.03.0360.06(12/01)

SUPERVISOR



REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS
163615	PATRICIA GALL		VACATION
	Salary Meeting	9/18/12	PERSONAL
			OTHER

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	9/18/2012		
END DATE	9/18/2012		
NUMBER OF DAYS TAKEN	Cover 11:00 PM Laurel Centre w/o Debra Wright (cover)		

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: *Maureen Norton*

DATE 9/14/12

SUPERVISOR

99.03.0360.06(12/01)



DURHAM
SCHOOL SERVICES

REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS
40395	Sin CHIN Tseu	10	VACATION
			PERSONAL
			OTHER

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	9-18-12		
END DATE	9-18-12		
NUMBER OF DAYS TAKEN	Safety Meeting		

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY:

Michelle Porter

DATE

9/14/12

99.03.0360.06(12/01)

SUPERVISOR



DURHAM
SCHOOL SERVICES

TO ATTEND RENEWAL TRAINING

REQUEST FOR TIME OFF

COVER MY ROUTE 12 FROM FAIRVIEW AT 11:20 AM

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS	
45931	CHANDRIKA PRASAD	13	VACATION	
			PERSONAL	
			OTHER	

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	9/18/12		
END DATE	9/18/12		
NUMBER OF DAYS TAKEN	2 HR.		

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: *Maheela Suben* DATE *9/14/12*

99.03.0360.06(12/01)

SUPERVISOR



Rt 100 (3) into class by 11:00

REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS
23133	Virginia Brooks-Sumner	13	VACATION
			PERSONAL
			OTHER

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	9/18/12		
END DATE	9/14/12		
NUMBER OF DAYS TAKEN			

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: Michelle Jordan

DATE 9/14/12

SUPERVISOR

99.03.0360.06(12/01)

DURHAM SCHOOL SERVICES
 * To Attend Safety Meeting
 * Cover (2) Kids At Laurel On MD

REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASON	REASON'S
760574	Mark W. Hodson	13	VACATION	✓
			PERSONAL	
			OTHER	✓

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	09/19/12 1000	4/30/12	
END DATE	09/19/12 1100		
NUMBER OF DAYS TAKEN	1 HOUR		

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: *Michael J. Porter* DATE 9/14/12

SUPERVISOR

99.03.0360.06(12/01)



REQUEST FOR TIME OFF

Cover mid-day
1 student for safety meeting

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS
013923	Luis McClellan		VACATION
			PERSONAL
			OTHER

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	9-19-12		
END DATE	9-19-12		
NUMBER OF DAYS TAKEN	1 hour		

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY:

Michelle Norton

DATE

9/17/12

98.03.0360.06(12/01)

PAYROLL



REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS
61401	TORI SIMON	13	VACATION
			PERSONAL
			OTHER

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	9-19-12		
END DATE			
NUMBER OF DAYS TAKEN			

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: Michelle Korton

DATE 9/18/12

99.03.0360.06(12/01)

PAYROLL



DURHAM
SCHOOL SERVICES

REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS	✓
168 934	Gregg J. Nelson	13	VACATION	
			PERSONAL	
			OTHER	✓

In service meeting this week during 8/11-12 time for 1 child - widow

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	09/20/12 - 9:30am		
END DATE	09/20/12 - 11:30 am		
NUMBER OF DAYS TAKEN	2 hr. (0.12)	1 hr. ONLY	

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: Michelle Dwyer DATE 9.19.12

99.03.0360.06(12/01)

PAYROLL



REQUEST FOR TIME OFF

EMP NO	EMPLOYEE NAME	CSC NO	REASONS	✓
94767	Raquelita Margera	2010	VACATION	✓
			PERSONAL	
			OTHER	

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	9-20-12		
END DATE	9-21-12		
NUMBER OF DAYS TAKEN	1		

AM ONLY - JIMMY

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: Michelle Norton DATE 9.19.12

99.03.0360.06(12/01)

PAYROLL



DURHAM
SCHOOL SERVICES

ON TRAINING. Please cover my 14 days from
FAIRVIEW, 1 CHILD ROSTER 112

REQUEST FOR TIME OFF

EMP NO.	EMPLOYEE NAME	CSC NO.	REASONS	
45921	CHANDRIKA PRASAD	13	VACATION	
			PERSONAL	
			OTHER	✓

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	9/20/12		
END DATE	9/20/12		
NUMBER OF DAYS TAKEN	1 HR.		

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: *Michael D. [Signature]*

DATE 9/19/12

99.03.0360.06(12/01)

PAYROLL



DURHAM
SCHOOL SERVICES

REQUEST FOR TIME OFF

#452

EMP NO	EMPLOYEE NAME	CSC NO	REASONS	✓
03653	Elida Welch	13	VACATION	
			PERSONAL	
			OTHER	

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	09/20/12		
END DATE	09/20/12		
NUMBER OF DAYS TAKEN	1 1/2		

only the 10:30 madison for safety ~~meeting~~ meetings
NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: *Michelle Forti* DATE *9/19/12*

PAYROLL

99.03.0360.06(12/01)



Need

REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASONS	
145878	David Hayden		VACATION	
			PERSONAL	
			OTHER	✓

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	10-1-12		
END DATE	Cover	P.M. from	3pm - onward
NUMBER OF DAYS TAKEN			

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: *Michelle Norton* DATE *9/28/12*

99.03.0360.06(12/01)

PAYROLL



DURHAM
SCHOOL SERVICES

Please copy mid day Annals into Glankler
and 11:30's out of Glankler #916
Also Brandon Martinez out of Mattos
At #916 - 11:30 only if not Date REQUEST FOR TIME OFF

EMP NO	EMPLOYEE NAME	CSC NO	REASONS
42162	INA LYNN DOG	13	VACATION
			PERSONAL
			OTHER

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	10-1-12		
END DATE	10-1-12		
NUMBER OF DAYS TAKEN	hours		

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: Michelle Fortin DATE 9/28/12

98.03.0350.06(12/01)

PAYROLL

STAFF DEVELOPMENT DAY-
NO STUDENTS



REQUEST FOR TIME OFF

EMP NO	EMPLOYEE NAME	CSC NO.	REASONS	✓
58628	ART ALCANTARA - 138		VACATION	
			PERSONAL	
			OTHER	✓

FRIDAY

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	OCT 19, 2012		
END DATE	OCT 19, 2012		
NUMBER OF DAYS TAKEN	1		

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: *[Signature]*

DATE: 10/5/12

99.03.0360.06(12/01)

PAYROLL

EMPLOYER'S EXHIBIT

5



Have a appointment, Just need my (pm) covered
Thanks, Michelle

REQUEST FOR TIME OFF

EMP. NO.	EMPLOYEE NAME	CSC NO.	REASON	
138633	Sharavetta Woods		VACATION	<input checked="" type="checkbox"/>
			PERSONAL	
			OTHER	<input checked="" type="checkbox"/>

DESCRIPTION	REQUEST ONE	REQUEST TWO	REQUEST THREE
START DATE	May 1, 2015		
END DATE	May 1, 2015		
NUMBER OF DAYS TAKEN			

NO SCHEDULED LEAVE WILL BE TAKEN UNTIL THIS FORM HAS BEEN REVIEWED AND APPROVED BY YOUR SUPERVISOR AND FILED WITH THE PAYROLL ADMINISTRATOR. IN AN EMERGENCY, YOUR SUPERVISOR WILL PREPARE AND HAVE THIS SIGNED UPON YOUR RETURN AND SUBMITTED IMMEDIATELY TO PAYROLL.

APPROVAL BY: _____ DATE: ____/____/____

EX-5

2015 EMPLOYEE ATTENDANCE CALENDAR

Form compliments of PPE.
For more copies, please
use your copy machine.

Absence Codes

- ☒ Tardy ☒ Holiday
☒ Partial Hrs. Worked ☒ Layoff
☐ ☒ Vacation

Red number denotes unexcused absence.

Black number denotes excused absence.

No. Reason

1. Lack of work
2. Sick (Employee)
3. Family sickness
4. Accident - self or family - out of plant
5. Plant injury
6. Personal
7. Discipline
8. Leave of absence
9. Transportation
10. No call / No show
11. Death (family)
12. Jury/Court

No. Reason

13. Birthday
14. Military
15. Weather
16. Medical Appt.
17. FMLA
18. Termination
19. Left Early
20. Suspension
21. Unexcused
- 22.
- 23.
- 24.
- 25.

N:

Et:

Ar:

Cl:

SHARQUETTA WOODS

Phone:

SSN:

Dept.:

Birth Date:

Position:

Hire Date:

Vacation Time:

JANUARY

S	M	T	W	T	F	S	Total
					2	3	
4	5	6	7	8	9	10	
11	12	13	14	15	16	17	
18	19	20	21	22	23	24	
25	26	27	28	29	30	31	

FEBRUARY

S	M	T	W	T	F	S	Total
1	2	3	4	5	6	7	
8	9	10	11	12	13	14	
15	16	17	18	19	20	21	
22	23	24	25	26	27	28	

MARCH

S	M	T	W	T	F	S	Total
1	2	3	4	5	6	7	
8	9	10	11	12	13	14	
15	16	17	18	19	20	21	
22	23	24	25	26	27	28	
29	30	31					

APRIL

S	M	T	W	T	F	S	Total
			1	2	3	4	
5	6	7	8	9	10	11	
12	13	14	15	16	17	18	
19	20	21	22	23	24	25	
26	27	28	29	30			

MAY

S	M	T	W	T	F	S	Total
					1	2	
3	4	5	6	7	8	9	
10	11	12	13	14	15	16	
17	18	19	20	21	22	23	
24	25	26	27	28	29	30	
31							

JUNE

S	M	T	W	T	F	S	Total
	1	2	3	4	5	6	
7	8	9	10	11	12	13	
14	15	16	17	18	19	20	
21	22	23	24	25	26	27	
28	29	30					

JULY

S	M	T	W	T	F	S	Total
			1	2	3	4	
5	6	7	8	9	10	11	
12	13	14	15	16	17	18	
19	20	21	22	23	24	25	
26	27	28	29	30	31		

AUGUST

S	M	T	W	T	F	S	Total
						1	
2	3	4	5	6	7	8	
9	10	11	12	13	14	15	
16	17	18	19	20	21	22	
23	24	25	26	27	28	29	
30	31						

SEPTEMBER

S	M	T	W	T	F	S	Total
		1	2	3	4	5	
6	7	8	9	10	11	12	
13	14	15	16	17	18	19	
20	21	22	23	24	25	26	
27	28	29	30				

OCTOBER

S	M	T	W	T	F	S	Total
				1	2	3	
4	5	6	7	8	9	10	
11	12	13	14	15	16	17	
18	19	20	21	22	23	24	
25	26	27	28	29	30	31	

NOVEMBER

S	M	T	W	T	F	S	Total
1	2	3	4	5	6	7	
8	9	10	11	12	13	14	
15	16	17	18	19	20	21	
22	23	24	25	26	27	28	
29	30						

DECEMBER

S	M	T	W	T	F	S	Total
		1	2	3	4	5	
6	7	8	9	10	11	12	
13	14	15	16	17	18	19	
20	21	22	23	24	25	26	
27	28	29	30	31			



PLASTIC PROCESS EQUIPMENT, INC.

6385 Montessouri Street, Las Vegas, Nevada 89113
 702-433-6385 • 800-258-8877 • Fax: 702-433-6388

PPE WEST

11218 Challenger Avenue, Odessa, Florida 33556
 727-834-8885 • 800-282-6783 • Fax: 727-834-8873

PPE SOUTH

8303 CORPORATE PARK DRIVE, MACEDONIA (Cleveland), OHIO 44056, USA

216-367-7000 • Toll Free: 800-321-0562 • Fax: 216-367-7022 • Order Fax: 800-223-8305

Toll Free: USA, Canada & Mexico
800-362-0706

EMPLOYER'S EXHIBIT

22

April 5, 2015

Since there are
no time off slips

I request in writing
to have Monday April 13, 2015

Maria Lopez Smy #74592

Date of 4/13/2015

Theresa Lynn Michaelson

CR-22

EMPLOYER'S EXHIBIT

23

Given 4/21/15

(Written Verbal)

National Express Corporation/Durham School Services
CORRECTIVE ACTION/COACHING MEMORANDUM

Coaching	<input checked="" type="checkbox"/>
Written	<input type="checkbox"/>
Final Written	<input type="checkbox"/>
Separation	<input type="checkbox"/>

Employee Name:

Job Title:

Darlene Matthes Bus driver

Location:

Date:

Supervisor:

2016 (Hayward) 4-21-15 Sandra Wilson

1. Performance or Behavior:

Attendance

2. Performance or Behavior Expectations:

Need to be at work daily.

3. Prior Discussions:

Please refer to pages 40-41 of employee handbook.

4. Consequence(s) if Performance or Behavior Does Not Improve to Expected Level:

Will receive written warning on future absences

5. Follow-up Date:

Continue to monitor attendance daily

6. Employee Comments:

7. Acknowledgment That This Memorandum Was Explained and Discussed With the Employee:

Supervisor's Signature: _____

Employee's Signature: _____

Witnesses' Signature: _____

Your employment with National Express Corporation/Durham School Services is at will in that you can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or yourself. The information in this memorandum is not intended to create either an express or implied contract of employment for a specific term or any other legally enforceable promise. Further, any promises or commitments made that are contrary to or in conflict with any provision of the Employee Handbook are not valid unless signed by the CEO of the Company.

CR-23

Given 4/21/15

Written Verbal

National Express Corporation/Durham School Services
CORRECTIVE ACTION/COACHING MEMORANDUM

Coaching	<input checked="" type="checkbox"/>
Written	<input type="checkbox"/>
Final Written	<input type="checkbox"/>
Separation	<input type="checkbox"/>

Employee Name:	Job Title:	
Eve Ashley	Bus driver	
Location:	Date:	Supervisor:
Hayward	4-21-15	Sandra Wilson

1. Performance or Behavior:

Attendance (3 occurrences)

2. Performance or Behavior Expectations:

To be at work daily

3. Prior Discussions:

Please refer to pages 40-41 of your employee handbook.

4. Consequence(s) if Performance or Behavior Does Not Improve to Expected Level:

Written warning in file if more absences should occur

5. Follow-up Date:

Continue to watch attendance daily

6. Employee Comments:

--

7. Acknowledgment That This Memorandum Was Explained and Discussed With the Employee:

Supervisor's Signature: _____

Employee's Signature: _____

Witnesses' Signature: _____

Your employment with National Express Corporation/Durham School Services is at will in that you can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or yourself. The information in this memorandum is not intended to create either an express or implied contract of employment for a specific term or any other legally enforceable promise. Further, any promises or commitments made that are contrary to or in conflict with any provision of the Employee Handbook are not valid unless signed by the CEO of the Company.

Given 4/22/15

Written Verbal

National Express Corporation/Durham School Services
CORRECTIVE ACTION/COACHING MEMORANDUM

Coaching	<input checked="" type="checkbox"/>
Written	<input type="checkbox"/>
Final Written	<input type="checkbox"/>
Separation	<input type="checkbox"/>

Employee Name:

Job Title:

Cassandra Torres Bus driver

Location:

Date:

Supervisor:

Hayward 4-21-15 Sandra Wilson

1. Performance or Behavior:

Attendance (3 occurrences)

2. Performance or Behavior Expectations:

To be at work daily

3. Prior Discussions:

Please refer to pages 40-41 of your employee handbook.

4. Consequence(s) if Performance or Behavior Does Not Improve to Expected Level:

Written warning in file if more absences occur.

5. Follow-up Date:

Continue to watch attendance daily

6. Employee Comments:

--

7. Acknowledgment That This Memorandum Was Explained and Discussed With the Employee:

Supervisor's Signature: _____

Employee's Signature: _____

Witnesses' Signature: _____

Your employment with National Express Corporation/Durham School Services is at will in that you can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or yourself. The information in this memorandum is not intended to create either an express or implied contract of employment for a specific term or any other legally enforceable promise. Further, any promises or commitments made that are contrary to or in conflict with any provision of the Employee Handbook are not valid unless signed by the CEO of the Company.

Written Verbal

National Express Corporation/Durham School Services
CORRECTIVE ACTION/COACHING MEMORANDUM

Coaching	<input checked="" type="checkbox"/>
Written	<input type="checkbox"/>
Final Written	<input type="checkbox"/>
Separation	<input type="checkbox"/>

Employee Name:

Job Title:

Anselma Valencia	Bus driver
------------------	------------

Location:

Date:

Supervisor:

Hayward	5-11-15	Sandra Wilson
---------	---------	---------------

1. Performance or Behavior:

Attendance

2. Performance or Behavior Expectations:

To be at work daily

3. Prior Discussions:

Please refer to pages 40-41 of your employee handbook.
--

4. Consequence(s) if Performance or Behavior Does Not Improve to Expected Level:

Written Warning in file if more unexcused absences should occur.
--

5. Follow-up Date:

Continue to watch attendance

6. Employee Comments:

--

7. Acknowledgment That This Memorandum Was Explained and Discussed With the Employee:

Supervisor's Signature: Sandra Wilson 5/12/15

Employee's Signature: _____

Witnesses' Signature: _____

Your employment with National Express Corporation/Durham School Services is at will in that you can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or yourself. The information in this memorandum is not intended to create either an express or implied contract of employment for a specific term or any other legally enforceable promise. Further, any promises or commitments made that are contrary to or in conflict with any provision of the Employee Handbook are not valid unless signed by the CEO of the Company.

Came in on 5/12 @ 10:00 Written Verbal
National Express Corporation/Durham School Services
CORRECTIVE ACTION/COACHING MEMORANDUM

Coaching	<input checked="" type="checkbox"/>
Written	<input type="checkbox"/>
Final Written	<input type="checkbox"/>
Separation	<input type="checkbox"/>

Employee Name:

Job Title:

Marilyn Morales Bus driver

Location:

Date:

Supervisor:

Hayward 5-11-15 Sandra Wilson

1. Performance or Behavior:

Attendance

2. Performance or Behavior Expectations:

To be on duty daily

3. Prior Discussions:

Please refer to pages 40-41 of your employee handbook.

4. Consequence(s) if Performance or Behavior Does Not Improve to Expected Level:

Written warning in file if more unexcused absences should occur

5. Follow-up Date:

Continue to watch attendance

6. Employee Comments:

7. Acknowledgment That This Memorandum Was Explained and Discussed With the Employee:

Supervisor's Signature: _____

Employee's Signature: _____

Witnesses' Signature: _____

Your employment with National Express Corporation/Durham School Services is at will in that you can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or yourself. The information in this memorandum is not intended to create either an express or implied contract of employment for a specific term or any other legally enforceable promise. Further, any promises or commitments made that are contrary to or in conflict with any provision of the Employee Handbook are not valid unless signed by the CEO of the Company.

Came in 5/15/15

Written Verbal

National Express Corporation/Durham School Services
CORRECTIVE ACTION/COACHING MEMORANDUM

Coaching	<input checked="" type="checkbox"/>
Written	<input type="checkbox"/>
Final Written	<input type="checkbox"/>
Separation	<input type="checkbox"/>

Employee Name:

Job Title:

Allison Ward

Bus driver

Location:

Date:

Supervisor:

Hayward

5-15-15

Bandra Wilson

1. Performance or Behavior:

Attendance (3rd occurrence)

2. Performance or Behavior Expectations:

To be on duty daily

3. Prior Discussions:

Please refer to pages 40-41 of your employee handbook.

4. Consequence(s) if Performance or Behavior Does Not Improve to Expected Level:

Written Warning will be placed in personnel file

5. Follow-up Date:

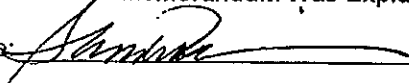
Continued monitoring

6. Employee Comments:

--

7. Acknowledgment That This Memorandum Was Explained and Discussed With the Employee:

Supervisor's Signature:



5/15/15

Employee's Signature: _____

Witnesses' Signature: _____

Your employment with National Express Corporation/Durham School Services is at will in that you can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or yourself. The information in this memorandum is not intended to create either an express or implied contract of employment for a specific term or any other legally enforceable promise. Further, any promises or commitments made that are contrary to or in conflict with any provision of the Employee Handbook are not valid unless signed by the CEO of the Company.

National Express Corporation/Durham School Services
CORRECTIVE ACTION/COACHING MEMORANDUM

Verbal

Coaching	<input checked="" type="checkbox"/>
Written	<input type="checkbox"/>
Final Written	<input type="checkbox"/>
Separation	<input type="checkbox"/>

Employee Name:

Job Title:

Khalida Gill Bus driver

Location:

Date:

Supervisor:

Hayward 5-28-15 Sandra Wilson

1. Performance or Behavior:

Late on route due to loss of Keys. (second time)

2. Performance or Behavior Expectations:

To be on time on route daily

3. Prior Discussions:

The importance of being on time

4. Consequence(s) if Performance or Behavior Does Not Improve to Expected Level:

Written report to be placed in file

5. Follow-up Date:

June 30th

6. Employee Comments:

7. Acknowledgment That This Memorandum Was Explained and Discussed With the Employee:

Supervisor's Signature:

5/28/15

Employee's Signature:

Witnesses' Signature:

Your employment with National Express Corporation/Durham School Services is at will in that you can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or yourself. The information in this memorandum is not intended to create either an express or implied contract of employment for a specific term or any other legally enforceable promise. Further, any promises or commitments made that are contrary to or in conflict with any provision of the Employee Handbook are not valid unless signed by the CEO of the Company.

Verbal

National Express Corporation/Durham School Services
CORRECTIVE ACTION/COACHING MEMORANDUM

Coaching	<input checked="" type="checkbox"/>
Written	<input type="checkbox"/>
Final Written	<input type="checkbox"/>
Separation	<input type="checkbox"/>

Employee Name:

Job Title:

Dontea Johnson Bus driver

Location:

Date:

Supervisor:

Hayward 5-29-15 Sandra Wilson

1. Performance or Behavior:

Overslept

2. Performance or Behavior Expectations:

To be on duty and on time daily

3. Prior Discussions:

4. Consequence(s) if Performance or Behavior Does Not Improve to Expected Level:

Could lead to suspension or termination

5. Follow-up Date:

June 29, 2015

6. Employee Comments:

7. Acknowledgment That This Memorandum Was Explained and Discussed With the Employee:

Supervisor's Signature:

Employee's Signature:

Witnesses' Signature:

Your employment with National Express Corporation/Durham School Services is at will in that you can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or yourself. The information in this memorandum is not intended to create either an express or implied contract of employment for a specific term or any other legally enforceable promise. Further, any promises or commitments made that are contrary to or in conflict with any provision of the Employee Handbook are not valid unless signed by the CEO of the Company.

EMPLOYER'S EXHIBIT

29

Table of Contents

Preamble.....	2
Article 1 – Intent and Purpose.....	2
Article 2 – Recognition	2
Article 3 – Management Rights.....	3
Article 4 – Company Rules.....	4
Article 5 – No Strike – No Lockout.....	4
Article 6 – Union Security, DRIVE, and Check-off.....	5
Article 7 – Shop Stewards and Union Representatives.....	7
Article 8 – Access to Premises and Company Records.....	7
Article 9 – Union Business.....	8
Article 10 – Protection of Rights.....	8
Article 11 – Bulletin Board.....	8
Article 12 – Access to Personnel Files.....	9
Article 13 – Drug and Alcohol Policy.....	9
Article 14 – Nondiscrimination and Harassment.....	9
Article 15 – Disciplinary Procedure.....	10
Article 16 – Grievance and Arbitration.....	12
Article 17 – Probationary Period.....	14
Article 18 – Seniority	14
Article 19 – Reduction in force and recall.....	15
Article 20 – Leaves of Absence.....	15
Article 21 – Access to Unemployment Benefits.....	17
Article 22 – Bereavement Leave.....	17
Article 23 – Injury on Duty.....	17
Article 24 – Jury Duty and Court Leave.....	18
Article 25 – Military Leave	18
Article 26 – Paid Time Off.....	18
Article 27 – Insurance.....	19
Article 28 – Life Insurance.....	20
Article 29 – 401 K.....	20
Article 30 – Categories of Work.....	20
Article 31 – Bidding.....	21
Article 32 – Hours of Work and Overtime.....	23
Article 33 – Wage Rates, Premiums and Differentials.....	24
Article 34 – Physicals.....	25
Article 35 – Safe Vehicles.....	25
Article 36 – Overnight Trips.....	25
Article 37 – Cleanliness of Vehicles.....	26
Article 38 – Uniforms.....	26
Article 39 – Payroll Errors.....	26
Article 40 – Separability and Savings Clause.....	26
Article 41 – Full and Complete Negotiations	27
Article 42 – Duration of Agreement	27

ER-79 1

PREAMBLE

This Agreement is entered into and is effective this 13th day of October 2012, between Durham School Services, hereinafter referred to as the "Company," and Teamsters Local Union 853, hereinafter referred to as the "Union."

ARTICLE 1 – INTENT AND PURPOSE

Section 1. The parties hereto enter into this collective bargaining agreement (Agreement) for the purpose of promoting and maintaining harmonious and peaceful labor conditions and establishing methods for a fair and peaceful adjustment of disputes that may arise between the parties. Both parties pledge to cooperate with each other in good faith in the enforcement of the terms of this Agreement. It is the intent of both parties to provide uninterrupted service to the school districts we presently serve or may serve in the future and to provide a secure and productive work environment to the employees of the Company.

This Agreement has as its purpose the establishment of an equitable and peaceful procedure for the resolution and settlement of all differences and disputes by first working through them together (Company and Union representatives) without involving the client, the media or the public.

Section 2. The parties, recognizing the competitive nature of the Company's business, hereby pledge mutual cooperation in providing high quality service to the Company's clients in an economic fashion, consistent with the terms set forth herein.

ARTICLE 2 – RECOGNITION

The Company recognizes the Union as the sole and exclusive representative for the purpose of collective bargaining with respect to wages, hours and working conditions for all full-time and part-time School Bus Drivers, Driver Trainers and Aides employed by the Company at its facilities located at 27577 Industrial Boulevard, Suite A, Hayward, CA, 94545 and 72 Rickenbacker Circle, Suite A, Livermore, CA, 94551, excluding all other employees, mechanics, dispatchers, administrative employees, office clerical employees, guards, professional employees, managers, and supervisors as defined in the National Labor Relations Act, as set forth in the Certification of Representative in NLRB Case Number 32-RC-072017.

ARTICLE 3 – MANAGEMENT RIGHTS

Section 1. All rights of the Company which have not been specifically abridged or modified by this Agreement are retained by the Company. The exercise of any such rights or functions shall not be subject to the grievance provisions of this Agreement unless in violation of a specific provision of this Agreement. Without limiting the generality of the foregoing, such right and functions specifically include:

- (a) The hiring, direction, supervision, discipline, demotion and discharge of employees;
- (b) The planning, direction, control, scheduling, modification, and elimination of any or all operations, and specifically including but not limited to the establishment, modification or elimination of routes and schedules and in general the determination of the nature and extent of service to be provided;
- (c) The determination of the layout, equipment, vehicles, structures and other materials of the business;
- (d) The procedures, policies, techniques, methods and means of operating the Company's business;
- (e) The determination of the number and time of shifts and establishment, abolishment or change of jobs and positions;
- (f) The right to lay-off, transfer or promote employees;
- (g) The determination of the overall organization of the Company's business;
- (h) The determination of the size of the workforce, the allocation and assignment of work, including extra work, to employees, the determination of policies affecting the selection of employees and/or applicants for employment, promotion or transfer, and;
- (i) The establishment of standards of customer service, quality of work and other measures of employee productivity, including improvement, change or elimination of methods, materials, equipment or facilities.
- (j) The right to make and modify reasonable work rules and regulations.

The foregoing statement of Management Rights shall not be deemed to exclude other management rights not specifically stated and not addressed within this Agreement, including those rights provided by law.

Section 2. The Company's failure to exercise any functions or rights hereby reserved to it, or its exercise of any function or right in any particular way shall not be deemed a waiver of its right to exercise such function or right, nor preclude the Company from exercising the same in some other way not in conflict with the express provisions of this Agreement.

Section 3. In the event of any conflict between the Company Handbook and the Agreement; the Collective Bargaining Agreement shall prevail, except that rules promulgated by the Client shall supersede the Company Handbook and the Agreement.

ARTICLE 4 – COMPANY RULES

Section 1. The Company may implement and enforce reasonable rules and regulations, or may modify or eliminate such rules or regulations, at any time so long as such rules or regulations are not in conflict with any specific provision of this Agreement.

Section 2. Prior to implementation of any new or revised work rule, the Company will post a copy, distribute copies to employees through the route mailboxes, and will provide a copy of the rule to the Union by facsimile, e-mail or certified mail, return receipt requested. If requested, and no later than seven calendar days after notification of the new or revised work rule, the Company will meet with the Union to discuss the rule. Such meeting and discussion shall not delay implementation of the rule or regulations.

Section 3. The Company may implement a new rule without first meeting with the Union to discuss said rule, when required in writing by the Company's client, or in the case of rules concerning safety that should not be delayed. Such meeting and discussion shall not delay implementation of the rule or regulations.

Section 4. The Company recognizes the right of the Union to challenge the reasonableness of a rule through the Grievance and Arbitration process. The Company will provide each employee with a copy of the Company rules and regulations.

Section 5. In the event of any conflict between the Company Handbook and the Agreement, the Collective Bargaining Agreement shall prevail, except that rules promulgated by the Client shall supersede the Company Handbook and the Agreement.

ARTICLE 5 – NO STRIKES - NO LOCKOUTS

Section 1. It is recognized that the Company and its employees are obligated to perform an essential public service, and that this service must be continuously performed to the fullest extent. If, for any reason, performance of duties involves undue difficulty, members of the bargaining unit represented by the Union will not cease work, but will immediately address the matter in an orderly way as provided in this Agreement.

Section 2. During the term of this Agreement, the grievance machinery of this Agreement and the administrative and judicial remedies provided by statute for remedying unfair labor practices shall be the sole and exclusive means for settling any dispute between the employees or the Union and the Company. Accordingly, the Union will not instigate, promote, sponsor, or engage in, or condone any strike, including a sympathy strike, wild cat strike, or stoppage of work against the Company. When it is determined to be safe and upon the explicit request of a supervisor or manager an employee may be expected in the execution of their duties to cross a picket line.

Section 3. The Union recognizes that in the event of a work action, as described above, the Union, its Officers and Stewards, have an obligation and a duty to urge any and all employees who may be involved in such activity to cease such activity and to immediately return to work.

Section 4. An employee who has been determined to have violated the provisions of this Article may be disciplined up to and including discharge. Such discipline shall not be subject to the Grievance and Arbitration provisions of this Agreement. The sole issue that may be subject to the Grievance and Arbitration provisions shall be the question of whether the employee engaged in such prohibited activity.

Section 5. The Company shall institute no lockout of employees during the term of this Agreement.

ARTICLE 6 – UNION SECURITY, D.R.I.V.E., AND CHECKOFF

Section 1. Union Shop: All present employees who are members of the Local Union on the effective date of this subsection or on the date of execution of this Agreement, whichever is the later, shall remain members of the Local Union as a condition of employment.

Union membership for purposes of this Agreement is required only to the extent that employees must pay either the Union's initiation fees and periodic dues or service fees determined in accordance with legal requirements.

All bargaining unit employees who are not members of the Local Union and all employees who are hired hereafter into the bargaining unit shall become and remain members of the Local Union as a condition of employment on and after the 31st calendar day following the beginning of their employment or on and after the 31st calendar day following the effective date of this Agreement, whichever is the latter, and that he/she will remain a member in good standing.

Section 2. Union Notification: The Company agrees to notify the Union of all new employees hired within seven (7) calendar days after the employee starts to work.

Section 3. Enforcement: An employee who has failed to acquire, or thereafter to pay initiation fees, dues and/or services fees to the Union as herein provided, shall be removed from the bargaining unit within 14 calendar days after the Company has received written notice from an authorized representative of the Local Union, certifying that membership has been, and is continuing to be, offered to such employee on the same basis as all other members and further, and that the employee has had notice and opportunity to make all dues or initiation fee payments.

Section 4. Applicable Law: In the event of any change in the law during the term of this Agreement relating to Union Security the Company agrees that the Union will be entitled to receive the maximum Union security that may be lawfully permissible.

Section 5. New Hires: When new or additional employees are needed, the Company will give the Union equal opportunity to supply names of applicants, and the Company shall choose between applicants referred by the Union along with any other applicants on the basis of their respective qualifications for employment. No applicants will be preferred or discriminated against because of membership or nonmembership in the Union.

Section 6. Checkoff: The Company, when hiring new employees, shall provide to such employees a Teamsters Local 853 Application and Authorization for Payroll Deduction form. All signed and completed Application and Authorization for Payroll Deduction forms shall be mailed to the Union immediately.

Section 7. Deductions and Remittance: For all employees covered by this Agreement who have executed and furnished to the Company a completed Application and Authorization for Payroll Deduction form, as referenced in Section 6, the Company agrees to deduct from their wages initiation fees and regular monthly dues and/or service fees and uniform assessments, and remit to the Union monthly all such money deducted no later than the 15th day of each month.

With remittance, the Company shall note on the monthly Union Dues Billing for all employees the amount of any dues or fees deducted, the last four digits of their social security number, current job classification, current wage rate and any change in status such as termination, layoff or leave of absence.

Section 8. D.R.I.V.E.: The Company agrees to deduct from the paycheck of all employees covered by this Agreement, voluntary contributions to D.R.I.V.E. D.R.I.V.E shall notify the Company of the amounts designated by each contributing employee to be deducted from the employee's paycheck on a biweekly basis for all weeks worked. The phrase "weeks worked" excludes any week other than a week in which the employee earned a wage. The Company shall transmit to D.R.I.V.E. National Headquarters on a monthly basis, by check, the total amount deducted from all employees who have voluntarily requested such deduction with the last four digits of each employee's social security number. The International Brotherhood of Teamsters shall reimburse the Company annually for the Company's actual cost for the expenses incurred in administering the biweekly payroll deduction plan.

Section 9. Indemnification: The Union shall indemnify the Company and hold it harmless against any and all claims, demands, suits, or other forms or liability of any kind, which may arise out of or by reason of actions taken by the Company for the purpose of complying with this Article.

ARTICLE 7 – SHOP STEWARDS AND UNION REPRESENTATIVES

Section 1. The Company agrees to recognize Shop Stewards as appointed by the Union.

Section 2. Shop Stewards may assist in the investigation, presentation and settling of grievances. Shop Stewards shall not be discriminated against in discharging duties assigned them by the Union.

Section 3. Shop Stewards have no authority to take any action that may interrupt the Company's business, except as authorized by official action of the Union.

Section 4. Shop Stewards may not conduct Union business during their working hours unless authorized by the Company. Shop Stewards will not be compensated by the Company for their duties as the Shop Stewards, except in cases where the Company specifically requests the Shop Steward to attend a meeting during the Shop Steward's bid route.

Section 5. Stewards may be granted time off without pay to attend a Local Union function or Labor Convention. The Principal Officer will give the Company at least seven calendar days' written notice of such leave. In all cases, while requested leave will not be arbitrarily denied, the business needs of the Company shall prevail.

Section 6. A Union member elected or appointed to serve as a Union official shall be granted a leave of absence during the period of such employment, without discrimination or loss of seniority rights.

ARTICLE 8 – ACCESS TO PREMISES AND COMPANY RECORDS

Section 1. The Company agrees to admit to its facility during its regular working hours the authorized Union Representatives for the purpose of observing the application of this Agreement, to investigate working conditions and adjust grievances. Authorized Union Representatives will confine any conversations with employees to nonwork time and will not interfere with the performance of work by employees or interfere with the Company's business.

Union Representatives shall report to the facility manager or Company supervisor on duty before any visit. Union Representatives must observe all Company safety rules while on the Company's premises. In the event of a change of representatives, the Company will be notified in writing.

Section 2. The Union may have access to Company records that are relevant to the Union's determination of whether the Company is in compliance with the terms of this Agreement (which includes for purposes of grievance handling). The Company will make these records available upon written request from the Union as soon as

reasonably practical after the request, and at such times and places as are convenient to the Company and the Union. The Company shall not unreasonably delay access to the requested relevant records, and the Union will use this process in a good faith effort to assure Agreement compliance.

ARTICLE 9 - UNION BUSINESS

Section 1. Stewards may be granted time off without pay to attend to Union business. For a Local Union function or Labor Convention, the Principal Officer will give at least seven (7) calendar days' written notice of such leave. For day-to-day Union business of short duration at least 48 hours' notice of the need for time is required. In all cases of time off for Union Business, while requested leave will not be arbitrarily denied, the business needs of the Company shall prevail.

Section 2. When requested by the employee, there shall be a Steward present whenever the Company meets with the employee to conduct investigatory interviews which may result in discipline or discharge or to discuss a grievance. In the case of a drug or alcohol test, the employee's request for a Steward may not delay the testing

ARTICLE 10 – PROTECTION OF RIGHTS

The Company shall not enter into any Agreement or contract with its employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such Agreement or Contract shall be null and void. All employees shall work in accordance with this Agreement.

ARTICLE 11 – BULLETIN BOARD

The Company will provide the Union with a bulletin board at its facilities covered by this Agreement. The location of the bulletin board will be in a conspicuous place as determined by the Company.

The Union shall have the right to post notices and meetings (regular, special or social) and bulletins of general, civic, or patriotic interest of the employees at the facilities covered by this Agreement. Any notice posted by the Union or on its behalf shall not be derogatory, offensive, or injurious to the Company's or its Client's interest, and shall be signed by the authorized representatives of the Union.

ARTICLE 12 – ACCESS TO PERSONNEL FILES

Section 1. The Company shall permit access by an Employee to his or her personnel file, upon written request from the Employee, and reasonable notice consistent with any legal requirement. The Employee may obtain copies of items in his or her file.

Section 2. The Company shall not release the contents of an employee's personnel file to any third party without signed authorization from the employee, or with proper legal process commanding release.

ARTICLE 13 – DRUG AND ALCOHOL POLICY

The Company may conduct various drug and alcohol screens according to its published policy and consistent with the federal Department of Transportation (DOT) regulations for such testing, recognizing that such policy may be changed from time to time by the Company without negotiation when required to remain in compliance with the DOT regulations. Discipline for violation of the policy will be at the Company's discretion, in accordance with Company policy. All employees covered by the Agreement are covered by the Company's Drug & Alcohol Policy and subject to drug and alcohol testing there under, regardless of whether they are a covered employee under the DOT regulations.

ARTICLE 14 – NONDISCRIMINATION AND HARASSMENT

Section 1: The Company and the Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex, national origin, sexual preference or age, or any other prohibited factor under federal, state or local law, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of race, color, religion, sex, national origin, sexual preference, age, or any other prohibited factor under federal, state or local law.

Section 2: It is the understanding of the parties, there shall be no harassment by any person, management or employee, whether or not it is sexual in nature or any other form. No person shall disparage any other person with profanity of any type. No person shall disparage in any sexual way the character of any person or individual by name calling, including any advances to any such employee or provoke in any way that may cause, under the term, sexual harassment in the work place as defined by law.

Prohibited harassment also consists of unwelcome conduct, whether verbal, physical, or visual that is based upon a person's national origin, age, disability, veteran status, marital status, sexual orientation, color, race, sex, or other protected group status.

Section 3: Any alleged violation of this section is subject to resolution through the grievance procedure, excluding any claims under the National Labor Relations Act, 29 USC., 151 et seq., workers compensation claims, and unemployment compensation claims.

Section 4. New Hires: When new or additional employees are needed, the Company will give the Union equal opportunity to supply names of applicants, and the Company shall choose between applicants referred by the Union along with any other applicants on the basis of their respective qualifications for employment. No applicants will be preferred or discriminated against because of membership or nonmembership in the Union.

ARTICLE 15 – DISCIPLINARY PROCEDURE

Section 1. The Company shall not discipline, suspend or discharge any employee without just cause. In any case of discipline, including warnings, discharge or suspension, the Company shall promptly notify the employee in writing of the discipline and the reason thereof. A copy of such written notice shall be promptly given to a Shop Steward and transmitted to the Local Union office. Discipline for all matters, except accidents when a police report is expected, must be issued within 14 calendar days of the date the Company learns of the possible infraction. In the case of an accident investigation where a police report is expected, the Company will issue its decision not later than 14 calendar days following receipt of the police report. The Company may request an extension of these time limits to complete its investigation, and the Union shall not unreasonably withhold agreement to such request.

Section 2. The Company may suspend an employee from work while it conducts an investigation of a possible serious performance infraction. Upon completion of the investigation, if the matter results in an unpaid disciplinary suspension that is shorter than the time off on investigative suspension, the employee will be paid for his or her lost work that exceeds the disciplinary suspension or if no suspension is warranted, the employee will be paid for all lost work.

Section 3. The signing of a discipline notice is not an admission of guilt and only an acknowledgment that the employee has received a copy of said notice.

Section 4. The Company recognizes that discipline is most effective when used to educate an employee to follow the rules and to properly perform his or her job. Thus, the Company recognizes the concept of progressive discipline including the following steps:

- Written warning or warnings, as appropriate;
- Suspensions;
- Final warning; and,
- Discharge.

However, it is understood that such steps will be applied on a case-by-case basis as determined by the Company based on the seriousness and severity of the violation, recognizing that some violations may be addressed with discharge for the first offense. Examples of grounds for discharge on the first infraction include, but are not limited to, leaving a child unattended in a vehicle, violation of the drug and alcohol policy, theft/dishonesty, use while driving of cell phone or other mobile communication/audio/video device, and failure to immediately report an accident. The Company recognizes the right of the Employee and Union to challenge the discipline decision on the basis of just cause through the Grievance and Arbitration process.

Section 5. The parties recognize that the School Districts reserve the right to remove a Driver or Aide from a route or service, however, a reasonable effort will be made to reassign the employee to an alternate route, if possible. If the Company receives a written request to remove an employee from a route or service, the Company will provide a copy of that request to the Union. If the Company is required to remove an employee by the client, the Company agrees to discuss the matter with the client in an attempt to resolve the matter. If the client maintains its position on the removal of the employee, the employee will be placed on an open route within the bargaining unit, if available. The Company and Union recognize that a client on the service to which the removed employee may be moved has the right to object to the move to that route or service and the employee may ultimately be laid off from employment with the Company. The requirement to remove an employee by a School District shall not be subject to the Grievance and Arbitration procedure.

Section 6. Discipline shall not remain in effect for a period of more than 12 months from the date issued on a revolving system that will disregard discipline that occurred more than 12 months in the past, except that serious safety-related infractions that do not result in discharge for the first violation (for example, leaving a child unattended on a vehicle, failure to immediately report an accident regardless of severity, or a single preventable accident that indicates a high level of negligence), shall remain on an employee's record for 36 months or 24 months, as stated below. Serious safety violations that remain on an employee's record for 36 months shall be defined as violations of Company rules or policies such as, but not limited to, Child Check policy (excluding failure to post the Child Check placard), violation of cell phone policy other than use of device while driving, moving violations that are the same or similar to those listed in the Federal Motor Carrier Safety Regulations. 40 CFR 383.51 as "Serious Traffic Violations," and preventable accidents (recognizing that some accidents may result in discharge regardless of how many have previously been found preventable). Safety violations that will remain on an employee's record for 24 months shall include, but not be limited to, failure to post the Child Check placard, seat belt violations and safety vest violations, and other safety violations of similar seriousness.

ARTICLE 16 – GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. The Company and the Union agree that in order to foster good Labor/Management relations, potential grievance issues may be best addressed if they are informally discussed and resolved, if possible, as early as possible after the issue is known. Therefore, the Company and the Union encourage employees to discuss the matter with the employee's Site Supervisor, Operations Supervisor or the General Manager as soon as possible after the issue comes to the employee's attention. Such discussion may include the Union Steward. However, such informal discussions shall not extend the time limits for filing or processing a grievance in writing as set forth in STEP 1, and it is the aggrieved party's responsibility to comply with those time limits.

Section 2. For purposes of this Agreement, a grievance is defined as a dispute between the parties concerning the meaning, interpretation, application or alleged violation by the Company of the express terms of this Agreement. If a dispute arises over the application or interpretation of this Agreement, the Company and the Union agree that the procedure outlined below shall be the exclusive remedy for such dispute:

STEP 1 – Grievances must be submitted in writing to the Site Supervisor or Operations Supervisor, or designee, not later than 15 calendar days after the employee knew, or should have known, of the alleged violation giving rise to the grievance. The grievance shall adequately identify the nature of the grievance, including date of the alleged violation, if appropriate, and the provision or provisions of the Agreement allegedly violated by the Company. The Site Supervisor or Operations Supervisor, or designee, shall schedule a meeting within 15 calendar days after receipt of the written grievance with the Union Business Representative and, if requested, the employee and/or the Union Steward. The Site Supervisor or Operations Supervisor, or designee, shall respond to the Grievance in writing to the Union Business Representative and the employee, if applicable, within 15 calendar days following the date of the meeting.

Suspensions of three or more workdays or discharge cases shall be commenced at STEP 2 within 15 calendar days of the date of the initial disciplinary decision.

STEP 2 – In the event the grievance is not resolved at STEP 1, the Union may submit the grievance to the General Manager, or designee, within 15 calendar days following the date of the Company's answer in STEP 1. The General Manager, or designee, Union Business Representative and, if requested, the employee and/or the Union Steward shall hold a meeting to discuss the grievance. The General Manager, or designee, shall respond in writing to the Union Business Representative within 15 calendar days following the date of the meeting.

It is understood that the Union may file a grievance and such grievance will be filed at Step 2.

Section 3. Voluntary Mediation: In the event the Company and the Union do not resolve the Grievance in STEP 2, the Company and the Union may by mutual agreement, refer the matter to mediation, utilizing the services of the Federal Mediation and Conciliation Service (FMCS). It is understood that the mediation process is to be expedited and at any time during the mediation process either the Company or the Union may withdraw from the process.

Section 4. Arbitration: In the event the grievance is not resolved in STEP 2, or in Voluntary Mediation, if invoked, the Union may refer the Grievance to arbitration by written notice to the General Manager and by filing a request with FMCS within 30 calendar days following the date of the General Manager's response in STEP 2, or the close of the voluntary mediation process, if invoked. The notice to FMCS must request a list of five names of impartial Arbitrators from the National Academy of Arbitrators (NAA), if the FMCS offers the option to narrow the list of impartial arbitrators to those who are members of the NAA, within the region nearest to the Company's premises. The General Manager, or designee, and the Union, shall, as soon as reasonably practical following receipt of the list of Arbitrators from FMCS, alternately strike names from the list until only one name remains. The remaining Arbitrator shall act as the impartial Arbitrator who shall hear and decide the issue.

Section 5. The Arbitrator shall have no authority to add to, delete from, amend, or in any way disregard any of the terms of this Agreement. In no event may the Arbitrator award back pay for a period in excess of 15 calendar days before the date the grievance was filed.

Section 6. The costs, fees and expenses of the arbitrator and hearing room will be equally shared between the Company and the Union. Other expenses shall be borne by the party who incurs the cost, unless otherwise mutually agreed, such as for transcription costs.

Section 7. The Arbitrator's decision shall be in writing and served on the Company and Union. The decision of the Arbitrator shall be final and binding upon the Company, the aggrieved employee and the Union.

Section 8. It is the intent of the parties that the time limits provided for shall be strictly followed. Exceptions to the foregoing time limits shall be made only upon mutual written agreement of the parties. Failure to comply with the time limits herein shall result in forfeiture of the filing party's position without setting precedent, except in the case of a group or class grievance, failure of the Company to answer at any step shall be deemed a denial of the grievance and the employee or the Union may advance the grievance to the next step. If a time limit expires on a Saturday, Sunday, or holiday, the final day shall be the next business day.

Section 9. No grievance may be presented hereunder filed if it occurred prior to the effective date of the Agreement.

ARTICLE 17 – PROBATIONARY PERIOD

Section 1. A probationary employee shall work under the provisions of this Agreement but shall be on probation for the first 90 calendar days of employment.

Section 2. The probationary period shall constitute a trial period during which the Company will judge the ability, competency, fitness and other qualifications of new employees to do the work for which they were employed. However, the Company has the right to discipline a probationary employee for any reason. The discipline or judgment of the Company regarding a probationary employee will not be subject to the grievance and arbitration procedure.

Section 3. With the agreement of the Union, the Company may extend the probationary period up to an additional 30 calendar days. The Company will advise the Union of any such extension prior to the expiration of the initial probationary period.

ARTICLE 18 – SENIORITY

Section 1. Employees covered by this Agreement shall be entitled to seniority rights. Seniority rights shall commence on the employee's first date of hire within the bargaining unit. If more than one (1) employee is hired on the same date, the employees' seniority positions will be determined by numerical lottery. Bargaining unit seniority shall prevail for bidding locations, routes, extra work and time off.

Section 2. Seniority shall be broken and all rights under this Agreement will be terminated upon:

- (a) Discharge for just cause;
- (b) Resignation/Voluntary quit
- (c) Layoff of 12 months
- (d) Failure to return to the bargaining unit within 90 calendar days after the employee accepts a position with the Company outside the bargaining unit.

Section 3. The Company shall maintain one seniority list by bargaining unit seniority. The Company will maintain a seniority list of Drivers posted in a conspicuous place and updated at least once each calendar quarter. The Company will send a copy to the Union showing names, addresses and phone numbers of each employee as reported to the Company by the employee.

Section 4. An employee who transfers to the bargaining unit from another location will retain his or her Company seniority for purposes of wage rates, benefits, and paid time off, and shall be placed at the bottom of the bargaining unit seniority list for all other purposes.

Section 5. Within thirty (30) calendar days after the signing of this Agreement, and at least quarterly thereafter, a list of employees, arranged in the order of their seniority, shall be posted in a conspicuous place at the place of employment and a copy furnished

to the Union for Union files. The Union copy will show names addresses and phone numbers of each employee. Claims for corrections to such seniority list must be made to the Company and the Union within thirty (30) days after the allegedly inaccurate posting is initially made. After such time the seniority list will be regarded as being correct.

ARTICLE 19 – REDUCTION IN FORCE AND RECALL

Section 1. When a reduction in force is necessary, it will be accomplished in the order of inverse bargaining unit seniority.

Section 2. Employees on layoff will be maintained on the recall list for 12 months. Employees will be recalled to work in the order of their seniority. To be eligible for recall, employees on layoff must keep the Company informed of their current address.

Section 3. The Company's obligation to offer recall shall be fulfilled by mailing notices by registered mail to the most recent address supplied by the employee on layoff. An employee on layoff must notify the Company of his or her intent to return within seven (7) calendar days after such recall notice has been received by the employee and report for work within 14 calendar days after receipt of the Company's written notification.

Section 4. The Union will be notified in writing by the Company when employees are recalled.

Section 5. This Article does not apply to seasonal and school year service breaks that are scheduled into a bid route.

Section 6. If there is a reduction of Home to School Work due to loss of a contracted client or district, the Company will determine the number of drivers who will be subject to layoff and layoff that number is inverse bargaining unit seniority order. The routes vacated by the laid off drivers shall be filled in seniority order by the employees affected by the loss of work.

ARTICLE 20 – LEAVES OF ABSENCE

Section 1. The Company may grant a leave of absence (LOA) without pay and without loss of seniority to employees who have completed 90 calendar days of employment, for good cause shown when requested by the employee in writing. Personal medical leave shall be limited to no longer than 24 consecutive months when supported by a physician's certification of the need for such absence. Nonmedical LOA may be granted by the Company for good cause shown in increments of not more than 30 calendar days to a maximum of 90 calendar days. The Company may require evidence of the continued need for any leave granted.

Section 2. Employees who have worked for the Company for a minimum of 12 months and who work the required 1,250 hours are eligible for unpaid leave as set forth in the Family and Medical Leave Act (FMLA), as amended.

- (a) Eligible employees are entitled to up to a total of 12 weeks of unpaid leave during any rolling 12-month period for the following reasons:
 - (i) Birth or adoption of a child or the placement of a child in foster care;
 - (ii) To care for a spouse or domestic partner, child or parent of the employee due to serious health condition;
 - (iii) A serious health condition of the employee; or
 - (iv) Because the employee's spouse, child or parent is called up for or is on active duty in the Armed Forces and the employee's circumstances justify the need for leave.
- (b) Service member family leave is available for up to 26 weeks in a single 12-month period because an employee's spouse, child, parent or next of kin is seriously ill or injured as a result of serving on active duty in the Armed Forces, including the National Guard or Reserves.
- (c) The employee's seniority rights shall continue as if the employee had not taken leave under this Section, and the Company will maintain its share of the health insurance premium for coverage in effect when the LOA occurs.
- (d) FMLA leave shall run concurrent with any other leave available to the employee.
- (e) An employee on FMLA will return to his or her original or equivalent position with equivalent pay, benefits and other employment terms.

Section 3. The Company may provide deferred leave without pay and without loss of seniority when a pending civil or criminal matter poses a risk to an employee's license, certification, or other job qualifications. The maximum length of deferred leave is one month for each year of service, for a maximum of six months.

Section 4. The employee is required to provide the Company with at least 30 days advance notice before starting LOA under this Article, if the need for LOA is foreseeable. If the LOA is not foreseeable, the employee is required to give notice as soon as practical. The Company has the right to require medical certification of a need for LOA. In addition, the Company has the right to require a second opinion health care provider, at the Company's expense. If the second opinion conflicts with the initial certification, a third opinion from a health care provider selected by the first and second opinion health care providers, at the Company's expense, may be sought, this shall be final and binding.

Section 5. The Company may require the employee to substitute accrued paid leave or other paid leave for all or part of the week leave period, including any other unused benefits.

Section 6. Failure to provide proper certification shall be cause for any leave taken to be treated as an unexcused absence.

Section 7. As a condition of returning to work, an employee who has taken LOA must be medically qualified to perform the functions of his or her job and be current on all licenses and qualifications.

Section 8. An employee who does not return to work on the specific day scheduled for his or her return (absent extreme extenuating circumstances that prevented the employee from contacting the Company) or who engages in employment with another employer while on such leave unless with the written approval of the Company, will be considered to have voluntarily quit his or her employment with the Company. Employees returning from an approved Leave of Absence must contact the Company at least seven (7) calendar days in advance in order to arrange to complete return to work requirements before resuming work.

Section 9. Disputes arising under this Article shall be subject only to the Grievance and Arbitration process of the Agreement, except as provided herein for a second or third medical opinion.

ARTICLE 21 – ACCESS TO UNEMPLOYMENT BENEFITS

The Company shall support access to unemployment benefits of Employees who are not working during seasonal breaks, when work is not available and the employee has not declined to perform available work.

ARTICLE 22 – BEREAVEMENT LEAVE

Paid bereavement leave of three (3) consecutive workdays shall be granted to employees in the event of the death of the employee's spouse, domestic partner with whom the employee resides, parent, child, parent of spouse or domestic partner, grandparent, grandchild, sister or brother. The Company may require proof of death and the relationship to the employee. Pay will be the employee's base pay for the time lost. Employees who request extra time shall be granted up to two (2) additional unpaid workdays off.

ARTICLE 23 – INJURY ON DUTY

When an employee is injured in the course of performing his or her duties and is released from duty by the Company or directed to stop work by a physician, the employee will be paid for his or her route for that workday.

ARTICLE 24 – JURY DUTY AND COURT LEAVE

Section 1. Employees shall be released from work with pay on the workdays serving on jury duty, not to exceed 15 workdays in a calendar year. Upon release from jury duty during the employee's scheduled workday, the employee must notify the Company of his or her release and return to work, if required by the Company. Pay shall be the difference between the juror fee and the employee's base rate for the employee's bid route.

Section 2. An employee who is required to attend court on behalf of the Company will be paid for necessary time lost from work. This time will be considered as hours worked. This Section does not apply to individuals who have been cited for an accident for which they were discharged by the Company.

Section 3. Any employee who is served a subpoena that will require the employee to attend court during the employee's scheduled work hours will be granted the necessary time off without pay when the subpoena is presented to the Company within the first workday after being served, and this absence will not be considered an attendance occurrence.

ARTICLE 25 – MILITARY LEAVE

The Company acknowledges the provisions of the Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA) and Veterans Reemployment Rights (VRR) statute, as amended, and shall comply with its provisions applicable to employees.

ARTICLE 26 – PAID TIME OFF

Section 1. Employees who have completed 120 calendar days of employment are eligible to earn paid personal time off (PTO) at the rate of 1.11 hours of PTO per biweekly pay period for the first three (3) years of employment, not to exceed 20 hours of PTO in a calendar year.

Section 2. Employees who have completed three (3) years of employment are eligible to earn paid PTO at the rate of 1.66 hours of PTO per biweekly pay period through nine years of employment, not to exceed 30 hours of PTO in a calendar year.

Section 3. Employees who have completed ten (10) years or more of employment are eligible to earn paid PTO at the rate of 2.22 hours of PTO per biweekly pay period thereafter, not to exceed 40 hours of PTO in a calendar year.

Section 4. In addition to the PTO accrual above, each January 1, the Company will credit to each employee one (1) day of PTO in the amount of 5.5 hours.

Section 5. An employee who does not work at least 50% of his or her scheduled work hours during a pay period shall not earn PTO for that pay period. Jury duty, bereavement leave, time off for Union business, and scheduled PTO and PTO that is statutorily protected shall be considered as time worked for purposes this Section.

Section 6. PTO may be used for any absences from work on a scheduled workday due to the employee's own illness or injury or for absences due to the illness, injury, health condition, treatment or preventative medical care, of the employee's spouse, domestic partner or child of the employee or for any other absence with advance notice to the Company, and on holidays when schools elect to close. An employee will be paid his or her scheduled hours for the day the employee is absent at the employee's base rate of pay, not to exceed the amount of PTO that is accrued and unused.

Section 7. Employees may not use PTO in increments of less than a full workday.

Section 8. Whenever possible, the employee must provide the Company with at least seven (7) calendar days' written notice of the employee's intent to use PTO, and if approved or if a statutorily protected leave, the absence will not result in an attendance occurrence noted on the employee's attendance record. If the need for time off is not foreseeable, the employee must notify his or her supervisor as soon as possible, but no later than two (2) hours before sign-on time.

Section 9. Once an employee has earned the maximum hours for a calendar year, the employee will have 12 months in which to use those earned hours. In the first full pay period in January of each year, the Company shall cash out each employee's banked, accrued and unused PTO that exceeds the 12-month accrual cap on PTO time for that employee, or upon request of the employee, cash out all accrued PTO.

Section 10. Upon separation of employment with the Company, regardless of the reason, the Company shall pay the employee all banked, accrued and unused PTO time.

ARTICLE 27 – INSURANCE

The Company will make a health plan (medical, dental, vision) available to eligible employees covered by this Agreement.

The Company will continue to contribute the same percentage as in effect on [date of ratification] toward the plan and participation level elected. The balance of the cost shall be paid by the participating employee. Greater details concerning the terms, conditions, exclusions, limitations, deductibles and other provisions of coverage are stated in the Summary Plan Description. The Company has the sole and exclusive right to change or modify the plans at any time following notification to the Union.

Employees electing to enroll in the plan shall have total annual premiums deducted from their paychecks over 16 pay periods during the regular school year.

Details of all group plans are set forth in the Formal Plan documents and those formal plan documents govern eligibility, benefits and all other terms and conditions of such plans.

ARTICLE 28 – LIFE INSURANCE

The Company shall maintain a life insurance policy for each employee in the amount of \$5,000.00 at no cost to the employee.

ARTICLE 29 – 401 K

Employees shall be able to participate in the Company's 401k in accordance with eligibility conditions and provisions of the plan.

ARTICLE 30 – CATEGORIES OF WORK

Section 1. Home-to-School Work: Includes all home-to-school (HtS) assignments providing transportation of students to and from the student's respective educational facility. This work includes weekday assignments in the AM, midday, and PM assignments. HtS work shall be selected in a General Bid. Home to school work is the essence of the Company's business and its primary source of revenue. All other categories of work are subordinate to home-to-school work; HtS work shall take precedence over all other work.

Section 2. Extra Work: Driving work for a school associated event requested and directed by the school client that may begin and end during the regularly scheduled school day, or may continue after those hours typically end (e.g., a school athletic event or function). Generally, this work is identified as field trips, extracurricular trips, and athletic trips, for example. For HtS-related work that may materialize with that HtS client, except for vacancies as defined in this Agreement, the Company will cover this work at its discretion including with cover Drivers and/or by breaking up a schedule and reassigning the work to other Drivers. In making such decisions, to the extent practical, the Company will honor seniority in offering and reassigning HtS-related work and work affected by the necessary route changes.

Section 3. Extra Revenue Work: This work includes charters not related to a school client and school work performed on days when school is scheduled to be closed, such as weekend days. This work will be offered to the most senior qualified and available Driver on the voluntary sign up list for Extra Revenue Work, and once that list is

exhausted, the Company will assign the work in reverse seniority order. It is understood there may be occasions when time is of the essence and the Company may be required to assign the work to the employee most immediately available regardless of seniority or placement on the voluntary sign up list.

Section 4. Nonrevenue Work: Nonrevenue work is work that generates no revenue to the Company, and does not include HtS work and Extra Revenue Work. This work may include general housekeeping duties, office and administrative duties, shuttle work, and other miscellaneous tasks for which the Company desires to offer such work to employees on a casual basis. Nonrevenue work, if practical, shall be offered to the most senior available employee on the voluntary sign up list for Nonrevenue Work and once that list is exhausted, the Company will assign the work in reverse seniority order if the Company elects to perform such work at that time. It is understood there may be occasions when time is of the essence and the Company may be required to assign the work to the employee most immediately available regardless of seniority or placement on the voluntary sign up list. Nonrevenue work will be performed by Cover Drivers and may be assigned to an employee on modified duty without consideration for any other active Drivers' seniority.

Section 5. Work Qualifications: In order to bid, be selected or to accept a category of work under this Agreement, the employee must be fully qualified to safely operate the required equipment, and must possess all required licenses and certifications for the category of work.

Section 6. Cover Drivers: Positions are awarded by the Company based on qualifications, employment and driving records, knowledge of the service area, and willingness to be available for all service. Cover Drivers are assigned at the Company's discretion to equalize to the degree practical the distribution of work as well as to mitigate payment of overtime, subject to the business needs and efficiency of the Company, with due consideration for seniority when other factors are equal.

Section 7. Bus Aides: An employee who does not do any driving, and who helps to care for and control the students.

ARTICLE 31 – BIDDING

Section 1. The Company shall publish the dates and times for the General Bid at least 14 calendar days prior to the General Bid. The Company shall notify the Union of the route schedules when received from the School Districts and upon request shall meet with the Union Business Representative to discuss issues in such schedules.

Section 2. The Company will determine the number of General Bids, provided, that all home-to-school (HtS) routes will be bid no less than once a year and all summer HtS routes shall be subject to a separate General Bid. The route bid will be posted as soon as possible in advance of bidding to allow Drivers an opportunity to review all available

HtS routes. If route details are not available at the General Bid for all School Districts, the Company will conduct a Location Bid to permit Drivers to select their preferred Location, and once the route details become available for the missing School District, the Company will post the new School District route details.

Section 3. The following information, when available and as applicable, will be identified in the description of each route posted for bid: whether AM, Midday, or PM work; number of students anticipated; schools served; and estimated route hours.

Section 4. Active Drivers shall bid by seniority on posted HtS routes. A Driver is considered "active" if he or she is not on an approved Leave of Absence on the general bid date, and is fully qualified, certified and licensed to perform all of the work involved in the HtS route the Driver bids.

Section 5. Where there are multiple buses available of the same type and style as assigned to the route by the Company, drivers may choose by seniority the bus they will drive at the time they bid their route. Bus selection is a courtesy only and shall be afforded only upon the General Bid and Summer Bid to the degree that the bus selected is of the type and style the Company determines is necessary to serve the route. Under no circumstances may a driver reject an alternate bus for the route at any time or for any reason when the bus selected at the initial bid is not available. It shall be solely within the Company's discretion to determine which bus/vehicle shall be assigned to a route.

Section 6. All drivers must have attended the start-up event held prior to the beginning of the school year. If the start-up event is not attended in person, the Driver must obtain a comprehensive review of the information presented, as approved by the Company, before driving the first day of school. With the exception of proxy bids, all active Drivers must be present to bid on the General Bid date on posted HtS routes. HtS routes that remain open after all active Drivers have bid shall be assigned or completed as determined by the Company until an active Driver, including an incumbent Driver who has lost his or her bid HtS route, a Cover Driver, or a newly hired Driver, is available to select such remaining routes.

Section 7. A HtS route that is vacant due to an approved Leave of Absence of 30 calendar days or less is considered a "temporary" vacancy. A HtS route that is vacant for an approved LOA for more than 30 calendar days or is vacant due to the bid Driver terminating from his or her Driver position, shall be considered a "permanent" vacancy.

Section 8. A permanent HtS vacancy shall be posted for bid within seven (7) calendar days of the date the HtS route is determined to be a permanent vacancy. It shall remain posted for five (5) workdays and shall be awarded within 48 hours after the posting closes. The Company may assign a permanent vacancy at its discretion until it is worked by the Driver to whom awarded. In the case of a temporary HtS vacancy, the Company may assign the work at its discretion, including to a Cover Driver for hold down or a newly hired Driver. Permanent vacancies may be bid by any Driver below

the seniority of the vacating driver. A vacancy created by a Driver who is awarded a permanent vacancy, shall be offered for bid in the same manner as the initial permanent vacancy was filled, and the subsequent vacancy may be assigned by the Company at its discretion, including to a Cover Driver for hold down or a newly hired Driver.

Section 9. A Driver on an approved LOA for more than 30 calendar days may select any open HtS route upon return to unrestricted Driving or may bump the least senior driver at the employee's Location if no open HtS route exists. A Driver on an approved LOA of 30 calendar days or less shall return to his or her previous route, if it exists, and if the route does not exist, the Driver may select any open HtS route or may bump the least senior Driver if no open HtS route exists. The application of these bidding rules to temporary or permanent vacancies shall be fully subject to federal and state FMLA requirements.

Section 10. When a new route is created, it will be bid according to the same procedures as a permanent vacancy.

Section 11. Midyear bids (new routes and permanent vacancies) may not be exercised by a Driver more than once during a school year, and may not be exercised during summer work.

ARTICLE 32 – HOURS OF WORK AND OVERTIME

Section 1. The regular workweek shall be Monday through Friday. An employee's paid time shall start at the designated sign-on time of the route, and paid time shall end when the employee returns the bus to the terminal or parking place and completes all assigned post-trip activity, including, for example, cleaning of the bus and all required paperwork or reports.

Section 2. Effective January 1, 2013, during the regular school year, drivers who report to work as scheduled and complete all work in the driver's home-to-school route (AM and PM), shall enjoy a daily guarantee of five and one-half (5.5) hours of work, including all required pretrip and post trip duties. For summer home-to-school work, drivers who report to work as scheduled and complete all work in the driver's route (AM and PM), shall enjoy a daily guarantee of five (5) hours of work, including all required pretrip and post trip duties.

Section 3. Cover drivers who report to work as scheduled and complete all work as assigned by the Company each day shall enjoy a daily guarantee of five and one-half (5.5) hours of work, including all required pretrip and post trip duties. All work performed by a Cover driver on a given day shall count toward meeting the daily guarantee.

Section 4. Each workday shall include a 15-minute allowance for conducting all pretrip duties, and five (5) minutes for performing all post-trip duties, including walk time

to and from the employee's vehicle, with such time built into the driver's route standard for the day. If the driver takes a different bus from the facility on a second or later pull out, the driver shall be paid 15 minutes for completion of a second pretrip inspection.

Section 5. In the event an employee's route does not utilize the full guarantee, the Company reserves the right to assign other work to the employee in order to realize the benefit of the guarantee. There shall be no guarantee for midday routes or other pieces of work. The guarantee shall not apply in the event of circumstances beyond the Company's control. A midday run shall not be counted as part of the guarantee; a run shall be considered a midday after the driver has returned to the yard.

Section 6. In the event an employee works in excess of his or her daily guarantee or route standard time due to traffic or other unforeseen circumstances, the employee may be required by the Company to submit a written report to explain and document the extra work. Employees may not sign on to work (either through electronic means or by starting assigned duties) more than 59 seconds in advance of the employee's designated start time, except as specifically directed by a supervisor or manager, and the employee may be required by the Company to submit a written report to explain and document the extra work.

Section 7. All work performed in excess of forty (40) hours per week shall constitute overtime. Overtime will be paid at the rate of one and one-half (1 ½) times the employee's regular hourly wage rate.

Section 8 The Company will pay for all training required by the Company, for in-service training, and recertification training, and such time will be considered hours of work.

ARTICLE 33 – WAGE RATES, PREMIUMS AND DIFFERENTIALS

Section 1. Increase the hourly wage rates of employees on the payroll on or before [date of ratification], as follows:

<u>[10/13/12]</u>	<u>1/1/13</u>	<u>1/1/14</u>	<u>1/1/15</u>
No change	\$.65	\$.50	\$.34

Starting rate for drivers through December 31, 2012, shall be \$12.50. Starting rate for drivers hired January 1, 2013, and thereafter, shall be \$13.00.

Each wage increase shall take effect on the full pay period during which the effective date occurs.

Section 2. Drivers will be paid various premiums in addition to the driver's base rate of pay, as set forth below, when performing the stated duties. In all cases, only the highest premium applicable will be paid.

- Driving a wheel-chair equipped bus \$.50 per hour
- Performing as a Behind-the Wheel (BTW) trainer \$.50 per hour

Section 3. Drivers who are designated as a Certified Instructor shall be paid a differential of \$1.00 per hour in addition to the driver's base wage rate for all work performed while the driver retains an Instructor certification. Additional pay premiums and differentials do not apply to an Instructor.

Note: Current employees (e.g., C. Borden, W. Woodworth, and M. Kempf) who have the premiums in Sections 2 and 3, above, built into their wage rate will retain such rate for so long as the driver maintains his or her certification and position and the premium or differential stated above shall not be added to their current rate except as the employee earns a higher differential and only to the extent of the increment above what is now built into the rate.

ARTICLE 34 – PHYSICALS

Section 1. Required physicals shall be performed by the Company's designated physician, and the cost of such physical shall be paid by the Company.

ARTICLE 35 – SAFE VEHICLES

No driver shall be disciplined for refusing to drive an unsafe vehicle. The dispute as to whether the vehicle is unsafe shall be referred to the Maintenance Manager, or designee, for final determination and the repair made, if necessary to make the vehicle safe. Under no circumstances will a driver be required to drive a bus without the Maintenance Department's signed and written determination that the vehicle in question is safe.

ARTICLE 36 – OVERNIGHT TRIPS

Section 1. In the event of an overnight trip, the Company shall arrange for and pay all hotel expenses. The Company will pay for all hours incurred between the origination of the work and hotel at the employee's base rate of pay, including all premiums and differentials.

Section 2. The Company will reimburse up to \$35.00 per day for meals while on an overnight charter, when supported by receipts.

ARTICLE 37 – CLEANLINESS OF VEHICLES

Section 1. The Company requires employees to clean their buses, and it shall provide the necessary cleaning products including paper towels, sanitizer, window cleaner, and trash bags. Proper equipment and training shall be provided to employees in order to clean or handle blood, bodily waste or fluids, chemicals or other hazardous substances.

Employees will be paid for all time spent cleaning, checking, inspecting and sanitizing buses.

Section 2. Employees may be required to periodically wash their vehicles, and will be paid one (1) hour for such duty. If more time is required than allotted, the employee will be paid for such time and shall be required to submit a report of the additional time. Generally, bus washing shall occur once each month, but may be required more or less often as directed by the Company.

ARTICLE 38 – UNIFORMS

The Company agrees that if any employee is required to wear a uniform as a condition of his or her continued employment, such uniform shall be furnished and maintained by the Company.

ARTICLE 39 – PAYROLL ERRORS

The Company shall make payroll corrections of less than \$50.00 in the following week's paycheck. Any correction greater than \$50.00 that is due to the fault of the Company, will be made not later than three (3) calendar days following notice.

ARTICLE 40 – SEPARABILITY AND SAVINGS CLAUSE

Section 1. Any part of this Agreement which conflicts with applicable City, State, or Federal laws or regulations shall be considered invalid. Such invalidity will not affect any other provision. Nothing contained in this Agreement is intended to violate any Federal or State laws, rules or regulations made pursuant hereto.

In the event that any Article or Section is held invalid or enforcement of or compliance with which has been restrained, as above set forth, the parties affected thereby shall enter into immediate collective bargaining negotiations after receipt of written notice of the desired amendments by either Company or Union for the purpose of arriving at a mutually satisfactory replacement for such Article or Section during the period of invalidity or restraint. There shall be no limitation of time for such written notice. It is the intent of this Agreement that the parties arrive at substitute language that effectuates to the extent legally possible, the original intent of the invalid provision(s).

ARTICLE 41 – FULL NEGOTIATIONS AND COMPLETE AGREEMENT

Section 1. The Company and the Union acknowledge that during negotiations which resulted in this Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed from law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of their respective rights and opportunities are fully and completely set forth in this existing Agreement. Furthermore, there are no understandings or agreements by the parties which are not expressly set forth in this Agreement.

Section 2. All past practices, whether written or oral, existing prior to the effective date of this Agreement are terminated as of the effective date of this Agreement unless they have been reduced to writing and expressly incorporated into the terms of this Agreement. Any practices occurring subsequent to the effective date of this Agreement shall not be evidence or be used to establish a practice binding in any way upon the Company, unless expressly agreed to as such in writing executed by the parties hereto, except to demonstrate the parties' interpretation of specific contract language if such language has been determined to be ambiguous.

ARTICLE 42 - DURATION OF AGREEMENT

This Agreement shall be effective October 13, 2012, to and including December 31, 2015, except as changes, amendments or supplements may be mutually agreed during its term and reduced to writing. This Agreement shall be automatically renewed from year to year thereafter, unless either party gives written notice of a desire to modify, amend or terminate same at least 60 calendar days but not more than 90 calendar days prior to the expiration date or any anniversary date thereof.

DURHAM SCHOOL SERVICES

By: Chuck Moore
Chuck Moore,
Region Vice President, West

By: Kirk Tostenrude
Kirk Tostenrude,
Region General Manager

Date: 02-11-2013

TEAMSTERS LOCAL UNION 853

By: Rome Aloise
Rome Aloise
Secretary-Treasurer

By: Adolph Felix
Adolph Felix
Business Agent

Date: 2/11/13

**MEMORANDUM OF UNDERSTANDING
BETWEEN DURHAM SCHOOL SERVICES, HAYWARD-LIVERMORE, CA (COMPANY)
AND TEAMSTERS LOCAL 853 (UNION)**

COVER DRIVERS AND CERTIFIED INSTRUCTORS EMPLOYED AS OF AUGUST 29, 2012

WHEREAS, the Company and Union have negotiated a first labor agreement covering all full-time and part-time School Bus Drivers, Driver Trainers and Aides employed by the Company at its facilities located at 27577 Industrial Boulevard, Suite A, Hayward, CA, 94545 and 72 Rickenbacker Circle, Suite A, Livermore, CA, 94551, for a duration of October 12, 2012 through December 31, 2015;

WHEREAS, the Company and Union are aware of two practices that are limited to Cover Drivers and Certified Instructors who were employed by the Company as of August 29, 2012;

WHEREAS, the Company and Union have determined that these two practices are of limited application to the individual employees identified herein;

THEREFORE, the Company and Union have executed this Memorandum of Understanding (MOU) to address these two practices for the individuals employed as Cover Drivers and Certified Instructors as of August 29, 2012, for so long as these individuals remain in these positions.

1. The Company will continue to provide five (5) paid holidays to the individuals identified herein. These employees will be paid eight (8) hours for each holiday as holiday pay and actual time for work on such holidays. In order to be paid for such holidays when not worked, the employee must complete all of his or her scheduled work on both the last workday before and the first workday after such holiday unless specifically authorized in advance to be off work. Time off due to bereavement leave and jury duty shall be considered as days worked for purposes of this benefit. The five holidays are Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.
2. The Company will provide an eight (8) hour daily guarantee of pay for each scheduled workday that the employee reports and works as scheduled to the individuals identified herein. The daily guarantee shall not apply to these employees when performing work on days outside of the regular workweek, such as Saturdays, Sundays and school holidays when school is not in session.

When none of the individuals identified herein hold the positions of Cover Drivers or Certified Instructors, this MOU will expire by its own terms.

DURHAM SCHOOL SERVICES

By: Chuck Moore
Chuck Moore,
Region Vice President, West

Date: 02/11/2013

TEAMSTERS LOCAL UNION 853

By: Rome Aloise
Rome Aloise
Secretary-Treasurer

Date: 2/11/13

EMPLOYER'S EXHIBIT

31

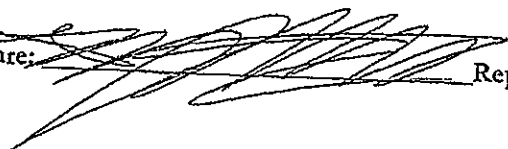
1 of 2

DRIVER'S INCIDENT REPORT

Driver's Name: <u>PAULA MONCADO</u>	Date of Hire: <u>6-4-14</u>	Date of Birth: <u>3-30-63</u>
Bus #: <u> </u>	Route #: <u> </u>	Date Occurred: <u>4-22-15</u> Time Occurred: <u>1440</u>
Location of Incident: <u>DISPATCH OFFICE @ HAYWARD CSC</u>		
Name of Supervisor Responding: <u>RON MAHLER</u>		
The Incident was: <u> </u> Motor Vehicle Accident <u> </u> Passenger Injury <u> </u> Other <u> </u>		

Description of Incident: AT THE TIME OF THE INCIDENT IT WAS EXTREMELY BUSY IN DISPATCH. MICHELLE WAS CALLING OUT MULTIPLE ROUTES, ADELLA WAS ON THE RADIO + TALKING TO DRIVERS WHO COULDN'T GET THROUGH AS WAS ALIZA. I WAS CALLING PARENTS + ANSWERING AS MANY CALLS AS I COULD. MOST OF THE CALLS WERE PARENTS LOOKING FOR THEIR KIDS + SCHOOLS LOOKING FOR BUSES THAT WERE LATE.

I WENT TO ASK MICHELLE A QUESTION AND SHE RESPONDED WITH A LOUD, "OH NO, ^{IT NOW DONT} YOU START! I ASK FOR THE BUS ETA FOR THE SCHOOL + SHE GIVES ME THE ANSWER. NEXT QUESTION I ASK + SHE DOESN'T EVEN LISTEN, BUT INSTEAD PUTS ME IN A VERY AWKWARD + EMBARRASSING MOMENT BY ASKING ME WHAT I SHOULD DO. LAST QUESTION SAME THING! DOESN'T LISTEN BUT GIVES HER ANSWER, THEN REMARKS, 'OH MY GOD'! (I DON'T KNOW WHICH ROUTES ARE DOWN OR WHO IS COVERING WHAT, I ALSO DON'T WANT TO UPSET A DRIVER WITH AN ETA B/C I KNOW THEY ARE STRESSED ALSO) SO I FELT EMBARRASSED AND BELITTLED BY HER REMARK. (HER VOICE IS VERY LOUD) SO I TOLD HER I DIDN'T NEED TO BE THERE, THAT I WAS

Driver's Signature: Reported Date & Time: 4-23-15

ER-31

EMPLOYER'S EXHIBIT

35

Expense Documentation Form**Rodney Smith**Date: April 8, 2015Payment by: AMEX / MC CASH Personal**Purpose of Meeting:**

- ☐ Grievance ☐ Arbitration ☐ Contract Proposal ☐ Contract Vote
☐ Negotiations ☐ Stewards Meeting ☐ Donation ☒ Organizing
☐ Trust Meeting ☐ Board Meeting ☐ Health & Welfare Discussion
☐ Convention ☐ Conference

Explanation: Durham / Dispatcher, Payroll Router MeetingLocation Name & Address _____
_____**Others Attending:**

Amount of Charges: \$ 66.50 Meals _____ Lodging _____
_____ Parking/Tolls _____ Gas/Oil _____
_____ Telephone _____ Auto/Maint _____
_____ Car Rental _____ Air Fare _____

Other: _____

Should any other party be billed for any part of these charges? If so, Please explain below:

Bill to: _____ Purpose of Meeting: _____

Amount: _____ Date(s) incurred: _____

ER-35

04/08/15 000001
HOC36 5:44PM SERV. 0020002

WT POT-FG RST DF	\$6.95
WSE NES	\$6.95
WEE CHEESE	\$0.60
WST FG 2/STRAW	\$6.95
WST FG 1FK-CHAN	\$6.25
WEE CLJE TONSTED	\$6.95
WEE CLJE TONSTED	\$6.95
WEE CHEESE	\$0.60
WST FG 1FK-CHZ	\$6.25
WST FG FOUNTAIN	6 11 \$1.75
WSE ST	\$10.50
	\$58.95
WST WSE	-10.00%
WSE ST	-5.00
TAX1	\$53.05
TAX2	\$3.45
TAT IN 2	\$0.00

CHARGEY \$56.50

TERMINAL ID: 00453000 0001

04/08/15 16:26

MASTERCARD
*****40258

SALE REF#: 522
BATCH #: 537 AUTH #: 685240

AMOUNT \$56.50

TIP \$ 10

TOTAL \$ 66.50

APPROVED R.A.S.

CUSTOMER COPY

Union Exhibit 1



APPLEBEE'S
NEIGHBORHOOD GRILL & BAR
24041 Southland Dr
Hayward, CA 94545
(510) 762-6400

BRIAN O TB#41
DATE: 04-30-15 TIME: 08:54 PM GUESTS: 7
Check #:7783-92899

1 2 FOR PROMO 31.00
2-4 MOZZ STICKS
2-4 9OZ SIRLOIN
2-4 9OZ SIRLOIN
1 ROOT BEER 2.59
***** GUEST # 1 SUB-TOTAL: 36.95

1 COFFEE 2.49
***** GUEST # 2 SUB-TOTAL: 2.74

1 2 FOR PROMO 22.50
2-4 BONELESS
2-4 CORGRMN CHX
2-4 CRNCH SHRP
SUB BAKER 1.49
1 SPIN DIP 7.00
1 ICED TEA 2.59
***** GUEST # 3 SUB-TOTAL: 36.94

1 PEPSI 2.59
***** GUEST # 4 SUB-TOTAL: 2.85

1 FISH & CHIPS 13.99
1 CIABATTA STX 1 0.75
1 SIERRA MIST 2.59
***** GUEST # 5 SUB-TOTAL: 19.07

1 FISH & CHIPS 13.99
1 CIABATTA STX 1 0.75
1 W/SAL 4.00
1 ICED TEA 2.59
***** GUEST # 6 SUB-TOTAL: 23.47

1 -9OZSHRP PRM STK 19.49
1 PEPSI 2.59
***** GUEST # 7 SUB-TOTAL: 24.29

Unia-1
Unia-1

EXHIBIT NO. 11 RECEIVED X REJECTED
CASE NO. 32-RL-150090 CASE NAME: Durham E. Hise
NO. OF PAGES: 3 DATE: 6/4/15 REPORTER: BC

We want to
See You Tomorrow,
so tell us
how we did!!!

Take Applebee's
GUEST EXPERIENCE SURVEY

Go online to:
applebees.com/survey

Receive 10 CHANCES to
WIN \$1,000 DAILY
PLUS you can INSTANTLY WIN
other GREAT PRIZES
valued at \$1500 WEEKLY!

No purchase/survey required to enter.
See website for complete rules,
eligibility, Sweepstakes period, and
previous winners. Sweepstakes sponsored
by Empathica Inc, across multiple
international clients. Winners drawn
from combined pool, not from
separate Applebee's pool. Void where
prohibited. Must be of legal age.
Canadian winners subject to skills
testing requirements.

* Serial Number: 047783282 *

Check TOTAL: 132.99
TAX: 13.32
Total Due: 146.31

Gratuity Examples
15 % Tip = \$19.95
18 % Tip = \$23.94
20 % Tip = \$26.80
TIP 29.26
TOTAL

DUPLICATE # 4 146.31

Short on time? TIP 29.26

Order Online! order.applebees.com

TOTAL BILL = 175.57

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

In the Matter of:)	
)	
DURHAM SCHOOL SERVICES, L.P.,)	
)	
Employer,)	
)	
and)	Case No. 32-RC-150090
)	
TEAMSTERS LOCAL 853,)	
INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS, CHANGE TO WIN,)	
)	
Petitioner.)	

**EMPLOYER DURHAM SCHOOL SERVICES, L.P.'S
POST-HEARING BRIEF IN SUPPORT OF ITS OBJECTIONS TO ELECTION**

McMAHON BERGER, P.C.

Geoffrey M. Gilbert, Jr.
Dean Kpere-Daibo
2730 North Ballas Road, Suite 200
St. Louis, Missouri 63131
(314) 567-7350
(314) 567-5968 (facsimile)

Attorneys for Employer
Durham School Services, L.P.

OF COUNSEL:

McMahon Berger, P.C.
2730 North Ballas Road, Suite 200
St. Louis, Missouri 63131

TABLE OF CONTENTS

I.	PROCEDURAL BACKGROUND.....	1
II.	STATEMENT OF THE FACTS	2
A.	Employer's Hayward Operation.....	2
B.	Lead Dispatcher Michelle Dorton.....	3
C.	Ms. Dorton's Supervisory Responsibilities	5
D.	Ms. Dorton Assisted In Scheduling And Communicating The Union Meetings To The Eligible Voters.....	12
E.	During The Eligible Voters' First Meeting With The Union, Ms. Dorton Threatened The Eligible Voters In Order To Obtain Their Signatures On Union Authorization Cards	13
F.	The Union Failed To Reject And/Or Repudiate An Employee's Injection Of Race Into The Employer's Reasoning For Challenging The Ballots Of Ms. Dorton And Ms. Corley.....	13
III.	DISCUSSION.....	14
A.	Applicable Legal Principles Of Supervisors Under The Act	14
B.	Lead Dispatcher Dorton Is A Section 2(11) Supervisor	15
C.	Ms. Dorton's Pro-Union Threatening And Coercive Conduct Is Objectionable Supervisory Taint	21
1.	Ms. Dorton's Threatening And Coercive Statement To Eligible Voters During A Union Meeting Interfered With The Eligible Voter's Exercise Of Free Choice In The May 8, 2015 Secret Ballot Election.....	23
a.	Nature and Degree of Supervisory Authority	23
b.	Nature Of The Objectionable Conduct	23
2.	Ms. Dorton's Conduct Interfered With The Freedom Of Choice To The Extent It Materially Affected The Outcome Of The Election.....	25
D.	The Union's Failure to Repudiate an Employee's Statement that the Employer Illegally Challenged Ms. Dorton and Ms. Corley's Vote Because of their Race is Objectionable Conduct.....	27
E.	The Board Should Take Adverse Inferences Against The Union.....	28
1.	The Union Fabricated Evidence In Response To The Company's Objections	29
2.	The Union Failed To Produce The Signed Receipt From Applebee's.....	32
3.	The Union Failed To Produce A Legible Copy Of Alvelais'	32
4.	The Union Failed To Produce Alvelais To Testify	33

F.	The Union Witnesses' Testimony Is Not Credible	34
1.	Michelle Dorton	35
2.	Rodney Smith	37
3.	Steve Bender.....	37
IV.	CONCLUSION.....	37

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

In the Matter of:)	
)	
DURHAM SCHOOL SERVICES, L.P.,)	
)	
Employer,)	
)	
and)	Case No. 32-RC-150090
)	
TEAMSTERS LOCAL 853,)	
INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS, CHANGE TO WIN,)	
)	
Petitioner.)	

**EMPLOYER'S POST-HEARING BRIEF
IN SUPPORT OF ITS OBJECTIONS TO ELECTION**

COMES NOW Durham School Services, L.P., Employer in the above-captioned matter, and herewith submits its Post-Hearing Brief in Support of its Objections to Election.

I. PROCEDURAL BACKGROUND

On April 14, 2015, the Petitioner, Teamsters Union Local 853, filed a Petition seeking to become the collective bargaining representative of all full-time and regular part-time routers, payroll department employees, office administrators, and dispatchers employed by the Employer at its Hayward, California facility. On May 8, 2015, the Board conducted the election and at the conclusion of the election, the Board determined that 4 votes were cast for the petitioning labor organization and 2 votes were cast against the petitioning labor organization. There was one (1) challenged ballot. The Employer filed three (3) objections to the election results on May 15, 2015, and on May 19, 2015, the Regional Director for Region 32 issued an Order directing the parties to participate in a hearing for the purpose of taking evidence concerning the Employer's objections to the election. Beginning June 2, 2015, the Employer and the Petitioner Union

participated in a hearing before Hearing Officer Jennifer Kaufman of Region 32 of the National Labor Relations Board in Oakland, California.

The Employer asserted three (3) objections to the May 8, 2015 secret ballot election: (1) the requisite laboratory conditions for a fair election were not present for the May 8th secret ballot election because of the pro-Union conduct of Supervisor, Ms. Michelle Dorton reasonably interfered with the eligible voters freedom of choice in the election; (2) the pro-Union conduct of Supervisor, Ms. Michelle Dorton reasonably tended to interfere with the eligible voter's freedom of choice whether to sign or not to sign union authorization cards; and (3) through agents and representatives, the Union coerced and threatened employees with being associated with unlawful activity by the exercise of a possible ballot challenge by the employer, even though the exercise of such right is both lawful and protected.

II. STATEMENT OF THE FACTS

A. Employer's Hayward Operation

At its Hayward, California operation, the Employer, a school bus company, transports children who have special needs, including some who use wheelchairs and other assistive devices, to and from school (TR 17). At the Hayward location, the Employer has a contract with the school districts in Fremont, San Leandro, San Lorenzo, Newark and Hayward, California, to provide these specialized services (TR 17). The Employer has approximately 105 drivers who serve approximately 150 routes at this location (TR 18). The drivers are represented by the Teamsters Union (TR 18).

In the mornings, the drivers travel to the children's homes to pick them up and then deliver them to the school, typically between 6:30 a.m. and 9:30 a.m. (TR 19). In the afternoon, the drivers pick up the children at the schools and then deliver them to their homes, typically

between 12:00 p.m. and 4:00 p.m. (TR 19). There are also mid-day routes that typically begin between 10:00 a.m. and 12:00 p.m. (TR 19).

Ronald Mahler is the current General Manager of the Employer's Hayward Customer Service Center (TR 377). He has worked in school bus transportation for 46 years and has been in his current position for three years (TR 377). Mr. Mahler is the highest ranking management official at the facility, with Sandra Wilson, Operations Supervisor, Eileen Noonan, Safety Supervisor, Jeremy Escobar, Fleet Maintenance Supervisor and Roxanne Liette, Livermore Site Supervisor, reporting directly to him (TR 378).¹ Directly below these individuals is Michelle Dorton, Lead Dispatcher (TR 379). Below Ms. Dorton are the other office staff, such as the administrator, dispatcher and routers, and below them are the drivers (TR 384).

B. Lead Dispatcher Michelle Dorton

Michelle Dorton, Lead Dispatcher, has been in the bus industry for 22 years and a dispatcher at the Hayward Service Center for 17 years (TR 23; 24). Ms. Dorton's name tag states she is the "Lead Dispatcher" (TR 20).² Ms. Dorton typically works from 10:30 a.m. to 7:00 p.m. (TR 22). Additionally, working in the dispatch office at the Hayward facility is Ms. Adela Garcia who is a dispatcher (TR 16).

In general, dispatchers are responsible for coordinating activities between the drivers and to supervise the drivers by making sure they leave the bus yard on time, they pick up the children timely and deliver them to the school safely, and they deliver the children home in the afternoon safely and on time (TR 418). Dispatchers also are responsible for ensuring all routes are covered

¹ The Hayward and Livermore facilities fall under the same contract to provide bus services for the same school districts (TR 378). Livermore is considered a satellite location of the Hayward operation.

² Paula Moncado, driver, noted that Ms. Dorton has a name badge hanging on her monitor that reads "Michelle Dorton, Lead Dispatcher" (TR 294). Ronald Mahler, General Manager, confirmed he too has seen Ms. Dorton's name badge that states she is the Lead Dispatcher (TR 383).

in the event a driver calls off (TR 418). They must consider various factors in covering routes, such as the computer program Versatrans, the route sheets, and their personal knowledge of the drivers, the routes and children being transported (TR 419). In the event of a vehicle breakdown, the dispatcher is responsible for making sure the children are safe and then transported to the school or their home as safely by getting another bus out to the location as quickly as possible (TR 419, 420).

As the Lead Dispatcher, Ms. Dorton has a heightened level of responsibility as she must know all of the routes and the condition of the child being transported to make sure the drivers have the proper equipment and vehicle to match the needs of the route (TR 418). Covering routes also is a necessary and important part of her responsibilities because the Employer frequently is short at least one driver (TR 23). To address such a shortage, Ms. Dorton can refer to "Versatrans," a program containing all of the various route details, which allows her to identify other drivers' routes to determine whether there is a sufficient enough gap in their route to fill in for the absent driver (TR 23). Another option available to Ms. Dorton to fill the route is to call out over the radio to ask for volunteers to take the route (TR 23-24). However, primarily Ms. Dorton will rely on her memory of which drivers are on which route to determine if drivers are available to assist with the route (TR 26). In such a situation, Ms. Dorton could contact the driver and determine if he/she was available to help on a particular route or a particular pick up (TR 27). If the Employer fails to cover a route, it is subject to fines referred to as liquated damages to be paid to the school district (TR 235).

In performing her job duties, Ms. Dorton uses the Employer's "fleet board," which contains specific information concerning the routes, busses, and drivers in service on a particular

day (TR 104-05). Ms. Dorton moves busses around the fleet board during the day in the event a driver calls off and she has to cover the driver's route (TR 106).

C. Ms. Dorton's Supervisory Responsibilities

One of Ms. Dorton's numerous supervisory responsibilities is to approve employee requests for time off. If a driver calls off, then it is Ms. Dorton's responsibility to make sure their route is covered (TR 55). If a driver requests time off through completion of a time off slip, the driver can deliver the slip to either Ms. Dorton, the Operations Supervisor, or the General Manager (TR 57-58). Although Ms. Dorton testified at hearing that when a driver presents her with a time off slip, she gives it to the Operations Supervisor, when asked to provide such slips in response to the Union's subpoena for such information, Ms. Dorton produced a banker's box full of time slips that she had retained in her possession (TR 62).

Further, the Employer introduced direct evidence of Ms. Dorton approving an employee's request for time off through Employer Exhibit 22 (TR 406; EX 22). As shown by this note, the employee (Maria Lopez) requested to take off work on April 6, 2015, and Ms. Dorton signed the note at the bottom with her signature (EX 22). Ms. Dorton explained that the normal request for time off slip form was not used in this particular situation because the Employer had run out of such slips and had ordered more, but they had not yet been delivered (TR 735).³

With respect to the time off slips entered into evidence at hearing as Employer Exhibit 4, each of them included Ms. Dorton's signature (TR 72; EX 4). Ms. Dorton confirmed that she

³ Although Ms. Dorton tried to explain away her signature on the note, her explanation is not credible as established on cross-examination. Specifically, Ms. Dorton could not articulate a credible justification for her position that her signature on the note was not an approval of the employee's request for leave. Rather, she maintained, incredibly, that she merely was indicating that she had received the document, even though she did not routinely do so for other employee requests for time off. Clearly, Ms. Dorton approved this employee's request for time off, as she has done repeatedly during her tenure as the Lead Dispatcher.

was in charge of the time off slips identified in Employer Exhibit 4 (TR 73). The General Manager at the time of the time slips in Employer Exhibit 4 granted her the authority to grant time off as indicated by her signature on the slips themselves (TR 73). Furthermore, it is important to note with respect to the slips identified in Employer Exhibit 4, these were discovered by Mr. Mahler on his own initiative after Ms. Dorton had not identified them in response to his request for all of the call off slips (TR 405). Rather, Ms. Dorton only directed Mr. Mahler to a box underneath the counter containing what turned out to be only some of the slips in her possession (TR 405). Later that evening, Mr. Mahler returned to Ms. Dorton's work area and discovered the additional request for time off slips that Ms. Dorton had not previously produced or identified (TR 411; EX 4). Notably, the forms Mr. Mahler discovered on his own that evening were different than the forms produced by Ms. Dorton in that the newly discovered forms had Ms. Dorton's signature on the approval line (TR 411-12; EX 4).

Ms. Dorton admitted at hearing that if she approved a request for time off, the employee would not be assessed an attendance point under the Employer's attendance policy (TR 123). Ms. Dorton would have considered the reason for the requested time off, the number of other drivers that were out at the time, and the type of route involved in making her decision to approve the time off (TR 124). In addition, if the driver calling off drove a wheelchair bus, then Ms. Dorton would need to consider this factor in determining who could replace the driver (TR 124).

On occasion, Ms. Dorton has had to fill a driver's route based on the information contained on the time off slip received from the driver prior to the point in time when the request for time off actually had been approved (TR 76). Also, Ms. Dorton would have to cover a driver's mid-day route without Ms. Wilson's signature or verbal permission on the request for

time off slip so long as that driver was performing another mid-day route (TR 94). In 2015, in fact, Ms. Dorton has had to cover a driver's shift without a signed request for time off slip (TR 90-91).⁴

Pursuant to the Employer's attendance policy, if an employee asks for time off in advance, it will not be recorded as an occurrence on their record, but if an employee calls off work the day of the absence, or takes off work even though his/her request was denied, then it will be counted as an occurrence (TR 143; EX 13).⁵ Ms. Dorton maintains a daily list of employees who take off without permission (TR 95). She then reports this information to Ms. Wilson, the Operations Supervisor (TR 98). Ms. Wilson relies on the dispatchers to determine who has called off on a particular day (TR 145). In fact, Ms. Wilson has disciplined drivers based on such information (EX 23; TR 238-39).

It is without dispute that only Ms. Dorton, Operations Supervisor Wilson, and Mr. Mahler, General Manager, are authorized to accept requests for time off slips from drivers (TR 156). Further, Ms. Dorton, along with Mr. Mahler and Ms. Wilson, are all authorized to grant time off to drivers who make such requests (TR 145-46). Shirley Myers, Administrator for the Hayward facility and eligible voter in the instant proceedings, also confirmed that Ms. Dorton has the authority to grant employees time off (TR 586).

Ms. Wilson has a specific procedure she follows when approving or denying a request for time off, which includes making certain notations on the request itself (TR 259; EX 25 and 26). Ms. Wilson does not verbally approve requests for time off, but does so in writing by signing the

⁴ Ms. Dorton's confirmation of this fact contradicted her earlier hearing testimony wherein she claimed she never covered a driver's shift unless she had assigned copy of a request for time off slip (TR 91).

⁵ Pursuant to the attendance policy, after a third occurrence, the employee receives a verbal coaching; after the sixth occurrence, the employee receives a written warning; after the ninth occurrence, the employee is subject to termination (TR 236).

request for time off slip (TR 146). The Employer presented a significant number of examples at hearing of requests that were approved or denied that did not contain Ms. Wilson's specific notations, establishing someone other than Ms. Wilson approved or denied the request. For example, Ms. Wilson did not sign EX 5 and, thus, did not approve that particular request for time off, even though the employee did not work the p.m. route and the employee's request for time off was granted (TR 147-48). Similarly, EX 6 is not signed by Ms. Wilson and she did not approve this request for time off, even though the employee's request was granted (TR 151). Another example is EX 14, where Ms. Wilson did not approve the request for time off, but the employee did not work the shift in question and was not assessed a point under the attendance policy, meaning the employee received approval for the absence (TR 156). *See also*, EX 15 (employee Pagan); EX 16 (employee Samnang); EX 17 (employee Perez); EX 18 (employee Jackson); EX 19 (employee Washington); EX 20 (employee Davis); EX 21 (employees Ruiz, Jones, and numerous others included within EX 21), which establish these employees were authorized to be absent.

Ms. Wilson did not sign any of these requests, she did not see these requests, and no attendance points were assessed for the missed time, but they were approved for time off from work during the shift worked by Ms. Dorton (TR 160; 234; 235). Each of these employees were approved to take off time from either their mid-day or p.m. routes, and the shift was covered by Ms. Dorton as the lead dispatcher. Ms. Wilson never told Ms. Dorton she did not have authority to approve time requests (TR 160). Mr. Mahler confirmed the foregoing practice was an accurate description of determining whether an employee would have received approval for a time off request (TR 389). Mr. Mahler also confirmed that he would not have approved any of

the requests for time off presented as examples at hearing that did not have his signature (TR 390).

Had the employees referenced in the Exhibits introduced at hearing not been given approval to take the time off as requested, then an attendance point would have been assessed to the employee's attendance record (TR 230). As shown in the Exhibits, however, no attendance points were assessed, meaning the requests for time off were approved. Moreover, driver Penny Reynolds confirmed at hearing that there were times where her request for time off was approved without a written signature, meaning Ms. Dorton approved it (TR 523). Further, when needing to take time off, Paula Moncado, driver, testified that she requests a time off slip from Ms. Dorton, completes the slip, and then returns it to Ms. Dorton (TR 294; 295).

Mr. Mahler confirmed that only he, Ms. Wilson, and Ms. Dorton are authorized to receive request for time off slips from drivers and, accordingly, these are the only three individuals authorized to approve requests for time off (TR 388). If Mr. Mahler were to receive the request for time off, he would ask Ms. Dorton if she could cover the route in the driver's absence, and if she could, then he would approve the request (TR 388-89). Just as Ms. Wilson, Mr. Mahler does not verbally approve requests for time off (TR 389).

Further evidence of Ms. Dorton's supervisory authority to grant time off is demonstrated by the following incidents. On one occasion, a driver (Stephanie Ibanez) got into an accident on her way home after work and the next morning, Mr. Mahler asked to speak with the driver to obtain her version of the events surrounding his accident (TR 412). Ms. Wilson informed Mr. Mahler that the driver was not there that day because Ms. Dorton had given her that day and the next day off (TR 412-13). On another occasion, Ina Lynn Door, a driver, received approval from Ms. Dorton to take time off for surgery she needed to have (TR 558).

As for the assignment of work by Ms. Dorton as the Lead Dispatcher, if a driver delivers a child to his/her home and a parent or other responsible party is not there to receive the child, then the driver is instructed to contact Ms. Dorton for further instruction (TR 118). Ms. Dorton will work with the school district to determine the best course of action to take with respect to what to do with the child until the adult is located (TR 118). Examples of decisions made by Ms. Dorton in this situation include sending another bus out to pick up the child or having the driver bring the child back to the bus yard (TR 120).

Ms. Wilson rarely becomes involved in the process of covering routes; that responsibility falls solely on Ms. Dorton's shoulders (TR 250). Ms. Wilson has heard Ms. Dorton inform a driver (Mark Hobson) that he had to cover a route due to another driver (Donna Jackson) having a conflict (TR 250). As a result, Mr. Hobson covered the route (TR 250).

Paula Moncado is a driver who was placed on light duty in the dispatch office for approximately four months in 2015 as a result of an injury (TR 290-91). At the beginning of the assignment, Ms. Wilson instructed Ms. Moncado that she was to take her orders from Ms. Dorton and to get approval from Ms. Dorton if she had to leave early (TR 301). Ms. Moncado asked Ms. Dorton what needed to be done while she worked in the dispatch office (TR 298). Ms. Dorton provided Ms. Moncado with her work assignments while she worked in the dispatch office, such as giving her a route sheet with parents' contact information that Ms. Moncado was required to call, having her answer the phones, calling out information on the radio, obtaining documents from the printer, and other various assignments (TR 299).

Ms. Moncado believed Ms. Dorton was her supervisor during the time she worked in the dispatch office (TR 300). Ms. Moncado based her belief in this regard on all of the directions she had given her and that she could not refuse Ms. Dorton's directions (TR 311). Unit

employee Shirley Myers confirmed that Ms. Dorton directs the work of others, including Adela Garcia, another dispatcher, such as by telling her to make sure the buses are in the yard, directing her to contact the parents when necessary, and ordering her to make sure the binder is properly completed (TR 590-91).

Further, Ms. Dorton counsels other dispatchers on their job performance, such as proper phone technique or communications with drivers (TR 252). In handling complaints from angry or upset parents about a transportation issue, Ms. Dorton rarely consults with Ms. Wilson about such conversations, while the other dispatcher, Ms. Garcia, does consult with Ms. Wilson (TR 253).

Ms. Dorton is authorized to give verbal counseling to drivers (TR 414). On more than one occasion, Ms. Dorton has questioned a driver about their decision to pick up a second child in a reverse order which resulted in the bus being late (TR 414). Ms. Dorton also has questioned drivers about them forgetting a child (TR 414). Each of these behaviors can result in liquidated damages being assessed against the Employer (TR 414).

Further evidence of Ms. Dorton's supervisory status with respect to counseling and correcting inappropriate behavior is shown through an event that occurred in April 2015 involving Ms. Moncado and another employee named Sharon (TR 300). Specifically, during a brief down period when the activity in the dispatch office was relatively slow, Ms. Moncado and Sharon were discussing various topics among themselves when Ms. Dorton stated, in a loud voice, "Excuse me, are you two still on the clock?" (TR 300). When they stated they were, Ms. Dorton stated, "Then I expect you should be working" (TR 301). After being admonished by her supervisor, Ms. Moncado returned to work (TR 301).

Ms. Dorton also criticized Ms. Moncado's work performance while she was in dispatch, telling her she needed to figure out an issue on her own; in essence, Ms. Moncado believed she was receiving a verbal counseling (TR 302). On another occasion, Ms. Dorton's attitude toward Ms. Moncado was so inappropriate that she filed a grievance with her Union, during which she told her Union representative that Ms. Dorton was the head dispatcher (TR 304; 310). An incident report was prepared on this issue (TR 400-01; EX 31).

D. Ms. Dorton Assisted In Scheduling And Communicating The Union Meetings To The Eligible Voters.

Prior to the Friday, May 8, 2015 secret ballot election, Michelle Dorton was the primary contact with Union Organizer, Rodney Smith, in the Union's attempt to organize the eligible voters (EX 2). As the Employer Exhibit 2 clearly indicates, Ms. Dorton communicated with the Union's Organizer, Rodney Smith directly regarding the filing of the petition as well as the setting up of Union meetings with the eligible voters. In fact, testimony presented at hearing established that Ms. Dorton set up and ultimately communicated to the eligible voters when the eligible voters were going to have a meeting (TR 581; 620).

Ms. Shirley Myers specifically testified that she was made aware of the Union meeting by Ms. Dorton when Ms. Dorton pulled her aside and informed her that the administrative staff were joining the Union and were going to have a meeting (TR 581). Ms. Dorton proceeded by instructing Ms. Myers that the Union meeting was very important and that they all needed to attend (TR 581). During hearing, Ms. Candace Comandao also testified that she was informed by Ms. Dorton of when the Union meeting would take place (TR 620). Ms. Comandao testified that Ms. Dorton called her on the phone and informed her of the meeting, the time, and the location (TR 620). Ms. Comandao also testified that Ms. Dorton told her to attend the meeting (TR 620).

E. During The Eligible Voters' First Meeting With The Union, Ms. Dorton Threatened The Eligible Voters In Order To Obtain Their Signatures On Union Authorization Cards.

In April of 2015, the eligible voters and Ms. Dorton attended a meeting with the Union at a restaurant named TOGO's in Hayward, California (TR: 583). Present during this meeting with the Union was Dispatcher Adela Garcia, Router Sherry Head, Router Candace Comandao, Payroll administrator Darlene Corley, Administrator Shirley Myers, and Ms. Dorton (TR 596). During this meeting, Union authorization cards were passed out for the employees to sign. In order to obtain the signatures of all the employees, including the signature of her subordinate, Adela Garcia, Ms. Dorton stated to the entire group of employees, **"If you want your job, you better sign this card"** (TR 610). During hearing, Ms. Myers testified that Ms. Dorton made this statement during the meeting with the Union in order to get all eligible employees to sign a union authorization card (TR 600;610). Additionally, Ms. Myers specifically testified that the statement was a threat and that it was made to the entire group of eligible employees who attended the Union meeting at TOGO's (TR 600; 610).

F. The Union Failed To Reject And/Or Repudiate An Employee's Injection Of Race Into The Employer's Reasoning For Challenging The Ballots Of Ms. Dorton And Ms. Corley.

The night before the secret ballot election, on May 7, 2015, several of the eligible employees were informed by the Union that the Employer had challenged the voting eligibility of Ms. Dorton and Ms. Corley (TR 339-342; 616). During a telephone conversation with Union Organizer, Rodney Smith, an employee (it was not identified which employee made such statement) indicated that the Employer was challenging Ms. Dorton and Ms. Corley's vote because of their race (TR 340-343). Mr. Smith testified during hearing that when such statements are made he merely bushes those types of things off (TR 342). Thus, instead of rejecting or repudiating such statements, the Mr. Smith merely brushed this statement off.

Subsequently, Ms. Comandao was in the dispatch room when she overheard a phone call with Ms. Dorton and Ms. Head where they informed Ms. Comandao that the Employer was challenging the votes of Ms. Dorton and Ms. Corley (TR 616). During this conversation, the employees became very upset because they could not understand why the Company could be allowed to not “allow” someone to vote (TR 618). In fact, Ms. Comandao became so upset by the Employer challenging the votes of Ms. Dorton and Ms. Corley that she changed her vote from a no to a yes (TR 616).

III. DISCUSSION

A. Applicable Legal Principles Of Supervisors Under The Act.

Section 2(11) of the Act defines “supervisor” as:

an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the forgoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). The possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status, as long as the authority is carried out in the interest of the employer and requires the exercise of independent judgment. Arlington Masonry Supply, Inc., 339 NLRB 817 (2003). “Failure to exercise authority does not negate supervisory status because possession rather than exercise of supervisory authority determines supervisory status.” Westwood Health Care Center, 330 NLRB 935, 938 (2000). Stated slightly differently, it is the existence of the supervisory power that determines whether the individual is a supervisor under the Act, not whether the individual actually has exercised that power. Arlington Masonry Supply, Inc., 339 NLRB at 818.

Thus, applying the foregoing definition, individuals are supervisors if “(1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is ‘held in the interest of the employer.’” NLRB v. Kentucky River Community Care, 532 U.S. 706, 713 (2001). An individual’s supervisory status can be established if the putative supervisor has the authority to either perform a supervisory function or to effectively recommend a supervisory function. The burden of establishing supervisory status rests upon the party seeking to assert the status. Dean & DeLuca New York, Inc., 338 NLRB 1046, 1047 (2003).

B. Lead Dispatcher Dorton Is A Section 2(11) Supervisor

There is more than sufficient evidence in the record of Ms. Dorton’s supervisory responsibilities in her position as the Lead Dispatcher of the Employer’s Hayward customer service center to establish her Section 2(11) status.

As the Employer clearly demonstrated at hearing, Ms. Dorton has supervisory authority to, and actually does, approve employee requests for time off. She is one of only three managers/supervisors at the Hayward facility who has the authority to grant employees time off, the other two being Ms. Wilson, Operations Supervisor, and Mr. Mahler, General Manager.

The Employer submitted clear evidence that Ms. Dorton has signed off on employee-submitted requests for time off on numerous occasions (EX 4).⁶ The Employer submitted additional evidence that Ms. Dorton approved employee requests for time off even when the proper forms were not available, such as when an employee provided her with a written note requesting time off (EX 22). Additionally, witnesses testified during the hearing that they went

⁶ The Employer was able to admit such evidence into the record despite Ms. Dorton’s effort not to reveal the existence of the slips to Mr. Mahler when he inquired of her.

to Ms. Dorton for approval to take time off. Shirley Myers, Administrator for the Hayward facility and eligible voter in the instant proceedings, confirmed that Ms. Dorton has the authority to grant employees time off (TR 586). Further, when needing to take time off, Paula Moncado, driver, testified that she requests a time off slip from Ms. Dorton, completes the slip, and then returns it to Ms. Dorton (TR 294; 295). In addition, Ms. Dorton authorized driver Ibanez to take off two days from work after she had been involved in an accident (TR 412-13) and authorized driver Door to take off time for surgery (TR 558).

The Employer also submitted abundant evidence that Ms. Dorton approved numerous other requests for time off (EX 5, 6, 14, 15, 16, 17, 18, 19, 20, and 21). Although Ms. Dorton claims not to have approved the requests set forth in these Exhibits, the Employer's evidence clearly establishes she did. Specifically, both Ms. Wilson and Mr. Mahler, the only other two management representatives with such authority, approve time off requests only in writing with their signature affixed to the request slip. Ms. Wilson and Mr. Mahler also confirmed, without contradiction, they do not verbally approve such requests for time off. The Employer then established unequivocally that the employees referenced in these Exhibits were not assessed attendance point violations as a result of their absences. Accordingly, their absences were approved by Ms. Dorton; otherwise, as the custodian of employee attendance records and call off slips, Ms. Dorton would have informed Ms. Wilson that these employees were absent without authorization, which would have resulted in the assessment of points on their record.

In short, the Employer has established, and the Union has failed to refute, that Ms. Dorton possesses the supervisory indicia of approving employee requests for time off. This authority is significant given its impact on employees' attendance records. In other words, should the employee not be given authorization to take time off, and then the employee actually

takes off the time requested, he/she would be subject to points being assessed to their attendance record. As set forth above, disciplinary action will result if an employee accumulates enough absences to reach the minimum thresholds set forth in the attendance policy.

In addition, Ms. Dorton assigns employees work through her role as the Lead Dispatcher. Specifically, Ms. Dorton is responsible for covering routes when the driver calls off, which requires her to locate available drivers and direct them to take over routes when practical (TR 250). For example, Ms. Dorton instructed driver Hobson to cover a route that another driver (Jackson) could not operate due to a conflict (TR 250). Ms. Dorton also directs drivers to assist with situations where a child's parents are not home to receive the child, which may require the driver to stay with the child or to bring the child back to his/her school or the bus yard to await further instructions from Ms. Dorton (TR 118-20).

Furthermore, the Employer submitted significant evidence that Ms. Dorton assigned all of the work performed by Paula Moncado during her stay in the dispatch area while she was on light duty. Ms. Moncado testified without contradiction that Ms. Dorton provided her with all of her assignments while working in the dispatch area and told her if she could leave early for the day to attend doctor's appointments (TR 298-99). Ms. Moncado expressly stated she could not refuse Ms. Dorton's instructions because she was her supervisor (TR 300). Ms. Moncado also observed Ms. Dorton give similar assignments to other dispatchers working in the area, including Becca (TR 311).

Also of great significance, unit employee Shirley Myers confirmed that Ms. Dorton directs the work of others, including Adela Garcia, another dispatcher, such as by telling her to make sure the buses are in the yard, directing her to contact the parents when necessary, and ordering her to make sure the binder is properly completed (TR 590-91). Ms. Door, driver, also

testified at hearing that she does not question the assignments Ms. Dorton gives her (TR 560). Ms. Moncado also confirmed Ms. Dorton's authority to assign work by relating a conversation Ms. Dorton had on the phone with a driver during which she informed the driver he had to cover the route of another driver, stating he could not do "this" to her and could not leave her like that (TR 308).

As yet additional proof of Ms. Dorton's supervisory status, Ms. Dorton is authorized to give verbal counseling to drivers (TR 414). On more than one occasion, Ms. Dorton has questioned a driver about their decision to pick up a second child in a reverse order which resulted in the bus being late (TR 414). Ms. Dorton also has questioned drivers about them forgetting a child (TR 414). Each of these behaviors, if not addressed, can result in liquidated damages being assessed against the Employer (TR 414).

As further proof, Ms. Dorton verbally reprimanded Ms. Moncado and another employee named Sharon for talking among themselves during work time (TR 300). Ms. Dorton asked them, in a loud voice, "Excuse me, are you two still on the clock?" (TR 300). When they stated they were, Ms. Dorton stated, "Then I expect you should be working" (TR 301). After being admonished by her supervisor, Ms. Moncado returned to work (TR 301). Ms. Dorton also criticized Ms. Moncado's work performance on another occasion while she was in dispatch, telling her she needed to figure out an issue on her own; in essence, Ms. Moncado believed she was receiving a verbal counselling (TR 302).

Additional facts support the Employer's position that Ms. Dorton is a statutory supervisor under the Act. For instance, if Ms. Dorton is not deemed a supervisor, there would be no representative of management present at the facility on a daily basis between 5:00 p.m. and 7:00 p.m. (TR 242). Varying numbers of drivers are still on the road during these evening hours and

incidents occur that require the drivers to contact a member of management for guidance, which would be Ms. Dorton since the other members of management are gone by this time (TR 248).

For example, the driver's bus could break down (TR 249), or a parent could call in to discuss a missed route or a child's needs for the next day, or the school district could call about a missing child (TR 416). Ms. Dorton is authorized to speak on behalf of the Employer during these communications (TR 416). Driver Moncado confirmed that if an issue arose after 5:00 p.m., she would call Ms. Dorton (TR 313). Mr. Mahler testified that Ms. Dorton is the only management representative at the facility at that time of the evening (TR 415). In fact, Ms. Dorton has the responsibility of locking the facility at night and making sure all employees are out of the building prior to locking and leaving for the night (TR 416).

Ms. Dorton herself views her role as supervisory in nature. Ms. Dorton refers to herself as Lead Dispatcher during staff meetings, such as when she stated during one particular meeting that as the Lead Dispatcher, she should be trained on the computer and have a say on who else would be trained on the computer (TR 381; 452-53). Ms. Dorton has approached Mr. Mahler and asked that her compensation level be increased because she supervises other employees (TR 400). Ms. Dorton had a similar conversation with Ms. Nelson about her compensation, claiming she should be getting paid more than Ms. Garcia because she was directing her work (TR 455). Ms. Dorton also maintains a name badge that expressly states her title is "Lead Dispatcher."

Other managers, supervisors and employees of the employer unquestionably regard Ms. Dorton as a lead dispatcher and supervisor. Upon her hire, Ms. Dorton was placed into the Lead Dispatcher position (TR 380-81; EX 1). Other members of the staff, including Candace Comandao, Router, refer to Ms. Dorton as Lead Dispatcher (TR 615). Drivers refer to Ms. Dorton as Lead Dispatcher, including Ina Lynn Door, who referred to Ms. Dorton as the person

to whom she and other drivers reported and from whom she received her work assignments (TR 557).

Further evidence is in the record that the managers, employees and Union representatives view Ms. Dorton as a supervisor. Specifically, in January 2015, Mr. Mahler was involved in a meeting with Union representative Alvelais during which they discussed complaints that Ms. Dorton's supervisory skills were creating a hostile work environment among the drivers (TR 397). Specifically, Ms. Alvelais was upset with the way Ms. Dorton was assigning work to employees and showing favoritism among the employees in her work assignments (TR 398). Ms. Ibanez also complained about the tone Ms. Dorton used toward some of the drivers which was causing the hostile work environment (TR 398). As a result of these concerns, Mr. Mahler removed the responsibility of handling the cover drivers from Ms. Dorton and gave it to Ms. Wilson (TR 398). In addition, Mr. Mahler agreed to get Ms. Dorton training on improving her supervisory skills (TR 398).

Unfortunately, Ms. Alvelais did not believe anything changed with respect to Ms. Dorton's conduct and she raised the issue again in March/April 2015 during a meeting with Mr. Mahler, Corina Nelson, Employee Relations Manager, and Union representative Alvelais (TR 399). Ms. Alvelais warned Mr. Mahler that he needed to get "his supervisor," referring to Ms. Dorton, under control or the issue would be escalated and the Company possibly could be fined (TR 400; 451).

In addition, driver Moncado adamantly testified at hearing that Ms. Dorton was her supervisor based on the fact that Ms. Dorton directed her in her assignments, gave her verbal demands that were to be followed, and decided whether she could leave for the day to attend doctor appointments which were necessary because of her injury (TR 304). In addition, Ms.

Moncado testified at hearing that she asked Ms. Wilson about taking off work early to attend such appointments and Ms. Wilson replied, "Clear it with [Ms. Dorton]" (TR 305). In fact, after asking Ms. Dorton about leaving early, Ms. Dorton would respond either with, "No, you need to stay," or "Yeah, I guess you could leave" (TR 305).

In short, the Employer has established with abundant, uncontroverted testimony and documentary evidence that Ms. Dorton is a statutory supervisor under the Act.

C. Ms. Dorton's Pro-Union Threatening And Coercive Conduct Is Objectionable Supervisory Taint.

The Board has long recognized that a supervisor's participation in a Union's organizational campaign will taint the union's card majority where the supervisor's participation may be found to have deprived employees of the opportunity to exercise free choice in selecting a collective bargaining representative. Waldinger Corp., 331 NLRB No. 544, 545-56 (2000); *citing* Juniata Packing Co., 182 NLRB 934, 935 (1970), *enfd.* in relevant part 464 F.2d 153 (3d Cir.1972); El Rancho Market, 235 NLRB 468, 473 (1978). In order to establish that there has been supervisory taint in the solicitation of union authorization cards, the Board has held that the evidence must establish either that the supervisor's activity was such as to have implied to employees that their employer favored the union or that there is cause for believing the employees were coercively induced to sign the authorization cards because of fear of supervisory retaliation. *Id.*; *citing* WKRG-TV, Inc., 197 NLRB 174, 175 (1971); *enfd.* 470 F.2d 1302 (5 Cir.1973); Orlando Paper Co., 197 NLRB 380, 387 (1972); El Rancho Market, 235 NLRB 468, 473 (1978).

Additionally, the Board clarified and expanded the legal standard applicable when an employer challenges the results of an election alleging objectionable pro-union conduct in Harborside Healthcare, Inc., 343 N.L.R.B. 906 (2004). Under Harborside, the Board must

consider two factors to determine whether supervisory taint has occurred. First, the Board must consider whether the supervisor's pro-union conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pro-union conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

Second, the Board must consider whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct. *Id.* According to the Board, "an express promise or threat is not a requirement for finding pro-union supervisory conduct objectionable." *Id.* Nevertheless, the Harborside inquiry seeks to foreclose conduct-however implicit or subtly framed-that, in the aggregate, pressures employees to support or oppose unions out of fear of retaliation. *Id.*

Lastly, under Harborside, objectionable conduct includes both "actual threats" and "implied threats of retaliation." *Id.* However, despite the Board's analysis looking for such actual and implied threats, the Board in Harborside made it clear that such evidence is not a requirement when it stated:

In our view, however, absent mitigating circumstances, supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not. By definition, a supervisor has the power to affect—for good or for ill—the working life of the employee. The solicitation of cards gives the supervisor the opportunity to obtain a graphic illustration of who is prounion and, by the process of eliminating nonsigners, who likely is not. When a supervisor asks that a card be signed, the employee will reasonably be concerned that the "right" response will be viewed with favor, and a "wrong" response with disfavor.

Id. at 911.

The facts established at hearing in the current proceedings, demonstrate that Ms. Dorton made threatening and coercive pro-union statements to the eligible voters, including her subordinate Adela Garcia, to induce the employees to sign union authorization cards. Such evidence clearly constitutes objectionable supervisory taint pursuant to Harborside.

1. Ms. Dorton's Threatening And Coercive Statement To Eligible Voters During A Union Meeting Interfered With The Eligible Voter's Exercise Of Free Choice In The May 8, 2015 Secret Ballot Election

The evidence presented at hearing clearly establishes Ms. Dorton engaged in objectionable supervisory taint when she made a threatening and coercive statement to the eligible employees, including her subordinate Adela Garcia, during a Union meeting.

a. Nature and Degree of Supervisory Authority.

As discussed *supra*, Ms. Dorton as the Lead Dispatcher is a statutory 2(11) supervisor as she has the authority to direct the work of drivers and dispatchers, grant and approve time off for employees, and verbally counsel/reprimand employees. In fact, Ms. Shirley Myers specifically testified that Ms. Dorton was dispatcher Adela Garcia's direct supervisor as she directs Ms. Garcia's work and many times verifies whether Ms. Garcia has performed the tasks Ms. Dorton has directed her to complete (TR 590). In addition, Ms. Dorton counsels Ms. Garcia or anyone performing dispatch duties regarding their job performance (TR 252). As such, the evidence established at hearing demonstrates that Ms. Dorton is a supervisor pursuant to the Act, and is the direct supervisor of dispatcher and eligible voter, Adela Garcia.

b. Nature Of The Objectionable Conduct.

The statement made by Ms. Dorton during a Union meeting was threatening and coercive conduct intended to induce the eligible voters, including her subordinate, Adela Garcia, to sign a

union authorization card. During a Union meeting attended by the Hayward facility eligible employees, in order to obtain the signatures of all the employees, including the signature of dispatcher Adela Garcia who Ms. Dorton supervises, Ms. Dorton stated to the entire group of eligible employees, **"If you want your job, you better sign this card"** (TR 610). Ms. Myers specifically testified at hearing that she understood this statement to be a threat to the group of employees (TR 600).

Such a statement is clearly an actual threat of retaliation against the employees if they did not sign a union authorization card. This statement is a clear indication that Ms. Dorton knew that she wielded the power to affect the employees' working life and was willing to threaten these employees' livelihoods in order to gain support of the Union. The testimony by Ms. Myers clearly established the employees who attended the Union meeting understood Ms. Dorton's statement as a threat of reprisal and retaliation if they refused to sign the union authorization cards (TR 600). As the Board stated in Harborside, when a supervisor asks that a card be signed, the employee will reasonably be concerned that the "wrong" response will be viewed with disfavor. However, in the instant case, none of the other eligible voters had to wonder whether refusing to sign the union authorization cards would be viewed with disfavor with Ms. Dorton. Ms. Dorton's statement threatening the entire group of employees' jobs if they failed to sign a card clearly demonstrates that Ms. Dorton would use her supervisory power to affect the entire group's working conditions, including her direct subordinate Ms. Garcia.

The Board held similar conduct was objectionable supervisory taint where several supervisors solicited union cards from employees, including those directly on their crew. Compare Millard Refrigerated Servc., 345 NLRB No. 95 2005 WL 2477120, at 4* (2005). Even more similar, the Board in Millard held there was supervisory taint where one supervisor told

employees, “if the union does not get in, everybody will probably be fired” and that same supervisor told the group he would “make their lives a living hell” if they didn’t support the Union. Id.

The conduct and statements by supervisors discussed in Millard was held to be objectionable conduct because of the threatening and coercive nature of the statements. Likewise here, Ms. Dorton’s pro-union conduct and statements were stated to a group of eligible employees, including an employee she directly supervises (Adela Garcia) and threatened the job security of the employees in order to induce the employees to sign authorization cards and support the Union. Clearly, when examining the nature, extent, and context of Ms. Dorton’s statement of “If you want your job, you better sign this card,” one must conclude that Ms. Dorton’s conduct constitutes objectionable supervisory taint.

**2. Ms. Dorton’s Conduct Interfered With The Freedom Of Choice To
The Extent It Materially Affected The Outcome Of The Election.**

The Board must conclude that Ms. Dorton’s threatening conduct interfered with the employees’ free choice to make an untrammelled decision on the issue of unionization. In an election with only seven (7) eligible voters and a final tally of 4 to 2 for the petitioning labor organization, such a threatening comment made to the eligible voters clearly would have materially affected the outcome of the election. Based strictly on the Union’s margin of victory, the Employer would have only needed a shift of one (1) vote to change the outcome of the election. When examining Ms. Dorton’s threatening and coercive statement, a threat of job loss, retaliation, or reprisal by a supervisor is more likely than not to have a material effect on an employee’s decision during a secret ballot election. In such a small bargaining unit of eligible voters, such a threat merely needs to have an impact on one (1) employee to change the outcome of the election.

Also, because this statement was made to the all of the eligible employees, except one (1), Ms. Dorton's threat of job loss if they failed and/or refused to sign the union authorization cards was clearly widespread within the eligible voting unit. This was not an isolated issue that was only heard or directed at one employee. Instead, this was a statement made to all the eligible employees except for one.

Lastly, as ruled in Harborside, because Ms. Dorton's conduct consisted of threats of job loss if the eligible employees did not sign a union authorization card, the conduct has a lingering effect. 343 NLRB 906, 913 (2004). The Board has a long standing precedent that threats of job loss are highly coercive and one of the most serious forms of election misconduct. Waste Management, Inc., 330 NLRB 634, 634 fn. 22 (2000); Lake-haven Nursing Home, 325 NLRB 250, 251 (1997). In addition, testimony at hearing established that Ms. Dorton was an adamant union supporter, who assisted with scheduling meetings, communicating with the Union, and spoke in favor of the Union throughout the Union's organizing campaign. As a result of Ms. Dorton's ongoing support of the Union throughout its campaign, Ms. Dorton's conduct would have a lingering effect.

Accordingly, because of the close margin of victory, the widespread nature of Ms. Dorton's conduct, and the lingering effect of Ms. Dorton's conduct, taken together, the Board must find that Ms. Dorton's conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election.⁷

⁷ The Union will argue the Employer's antiunion campaign will mitigate Ms. Dorton's conduct. However, the evidence presented at hearing clearly establishes that while the Employer did conduct an antiunion campaign, the Employer instructed employees during meetings regarding unionization that the Employer could not make any promises (TR 742). More importantly, while the Union presented evidence of some of the messaging presented by the Employer during its campaign, the record is void of any evidence that the Employer learned of Ms. Dorton's threatening and coercive statement and took timely and effective steps to disavow it to the employees prior to the election. Harborside, 343 NLRB 906, 914 (2004).

D. The Union's Failure to Repudiate an Employee's Statement that the Employer Illegally Challenged Ms. Dorton and Ms. Corley's Vote Because of their Race is Objectionable Conduct.

The Board in Sewell Mfg. Co., 138 NLRB 66 (1962), held that it would set aside elections when a party embarks on a campaign which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals. 138 NLRB at 72. While the Board in Shawnee Manor, 321 NLRB 1320 (1996), held the applicability of Sewell to third-party racial remarks that were made by a pro-union employee were not sufficient to set aside an election, such remarks possibly could be if they inflamed and tainted the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility. Id.

Here, the facts are clear that on May 7, 2015, the night before the secret ballot election, Ms. Dorton, Ms. Sherry Head, and Ms. Comandao, learned that the Employer was challenging the votes of Ms. Dorton and Ms. Corley (TR 616). During a phone conversation with Union Organizer Rodney Smith, an employee raised the issue of racism by the Employer was the reason for challenging Ms. Dorton and Ms. Corley's votes (TR 342). Instead of rejecting and/or repudiating such statements or claims by one of the employees, Mr. Smith testified that he merely brushed it off (TR 342).

As a result of the Union's admitted failure to repudiate, reject, and correct the employees who made such statements injecting race as the reason for the Employer's challenges, such comments must fall to or be attributed to the Union. During hearing Mr. Smith testified that he would have corrected Ms. Dorton if he would have heard her threaten the employees at the first Union meeting (TR 634-35). However, when questioned about the employee(s) claiming race as the reason for the Employer's challenges of Ms. Dorton and Ms. Corley's votes, Mr. Smith would merely brush it off instead of repudiating the patently false statements as he would a threat

that would be attributable to the Union. In essence, Mr. Smith's silence and failure to reject the employee(s) assertion that racism was the reason for the Employer's legal challenges was an endorsement of such patently false statements.

Additionally, the facts established at hearing clearly establish the injection of race inflamed and tainted the atmosphere in which the election was held. During hearing, Ms. Comandao testified that prior to May 7, 2015, she had decided that she was going to vote no, but as a result of learning that the Company challenged Ms. Dorton and Ms. Corley's votes, she became very upset and changed her vote to a yes (TR 616-17). The evidence presented at hearing establishes the employees were very upset and didn't understand how the Company could not allow the two employees to vote (TR 618). The Union's silence and failure to repudiate the injection of race into the Employer's reasoning for challenging the votes the day before the secret ballot election clearly inflamed and tainted the atmosphere in which the election was held to the extent that to make a reasoned basis for choosing or rejecting a bargaining representative was an impossibility for Ms. Comandao.

E. The Board Should Take Adverse Inferences Against The Union.

Both the courts and administrative agencies have long recognized that "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse." Interstate Circuit v. U.S., 306 U.S. 208, 226 (1939). The Board has also recognized this long-standing principle in implementing the "adverse inference rule." Martinson Elec. Co. & Int'l Bhd. of Elec. Workers, Local Union 915, AFL-CIO, ES 12-CA-16387, 1995 WL 1917976 (June 29, 1995). Under the "adverse inference rule," the Board has held that "a party's failure to present evidence within its possession that may reasonably be assumed to be favorable to it raises an adverse inference regarding the factual issue that the evidence could

have addressed.” Rcc Fabricators, Inc., 352 NLRB 701, 711 (2008). In other words, “when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.” Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. N. L. R. B., 459 F.2d 1329 (D.C. Cir. 1972); see also Martin Luther King Sr., Nursing Center, 231 NLRB 15 fn. 1 (1997). The Board has repeatedly held that where there is ample opportunity for a party to produce evidence that would reasonably be assumed to be favorable to its position, but the party fails to produce the evidence, and lacks any satisfactory explanation, an adverse inference should be drawn. See Rcc Fabricators, Inc., 352 NLRB 701, 726-27 (2008); Chrysler, LLC & Local 412, 354 NLRB 1032, 1036 (2010); In Re Grand Rapids Gravel Co., 7-CA-44094, 2002 WL 31668577 (Nov. 22, 2002).

1. The Union Fabricated Evidence In Response To The Company’s Objections.

At hearing, the Employer introduced a summary of a union meeting drafted by Steve Bender (“Bender”), Union organizer, into evidence (EX-27). The competent record evidence irrefutably establishes that Bender’s summary is a fabricated document created after the fact and solely to provide the Union with a defense to the Employer’s objection regarding challenged ballots.

In support of position in this respect, the Employer asserts at hearing both Bender and Smith testified that the first time they learned that the Employer intended to challenge the votes of Corley and Dorton was when the Union received the voter eligibility list from the Employer on April 22, 2015 (TR 353, 468-469). The summary, however, is dated April 21, 2015 – one day prior to the date the Employer sent the voter eligibility list to the Union. As such, it would have been impossible for the Employer’s intention to challenge Corley and Dorton’s votes to have been raised at a meeting on April 21, 2015 and the only logical explanation for the summary is

that it was created out of whole cloth by the Union to assist in the Union's defense of the Employer's objections.

At hearing, Bender attempted to address the problem created by the fact that the summary referencing a discussion of the Employer challenging Dorton's ballot is dated prior to the time the Employer indicated it intended to challenge Dorton's ballot by testifying that his notes were incorrectly dated. According to Bender, the Union meeting referenced in the summary took place on April 30, 2015 and the summary should have reflected that date. This explanation by Bender, however, even if true, does not establish that EX-27 is anything more than a fabricated document. In this respect, even if the summary pertains to a meeting conducted on April 30, 2015, the following irrefutably proves that the summary was fabricated:

- Bender testified that he rewrites his initial notes to ensure accuracy, correct spelling errors and correct grammatical errors (TR 461, 463-465, 492-493). Bender also testified that prior to producing EX-27 in response to the Employer's subpoena he noticed that the date on the document was incorrect (TR 476-478). Despite Bender's practice of rewriting his notes to ensure accuracy, Bender submitted his summary with an incorrect date (TR 478). In addition, the summary is replete with misspelled words and grammatical errors (EX-27; TR 463-464).
- Smith testified that after Union meetings, he debriefs with Bender (TR 330). Smith also testified that he called Dorton and other eligible voters 2 or 3 days before the election to tell Dorton her vote was going to be challenged (TR 336-342, 352-353). If the issue of the challenged ballots had been brought up during the April 30, 2015 meeting as Bender claimed, Bender would have told Smith about his conversation with the eligible voters regarding the challenged ballots and Smith would have had no reason to call Dorton and discuss the issue.
- Dorton, Myers and Candy all testified that the Employer's intention to challenge Dorton and Corley's votes was never discussed at the Union meeting conducted by Bender (TR 586-587, 615-616, 749-754).
- If the issue of challenged ballots had been raised by the eligible voters at the April 30, 2015 Union meeting as Bender claims, it defies common sense to believe that

the eligible voters would have only discussed Dorton and not Corley. Bender's summary, however, only refers to Dorton (EX-27; TR 503, 506).

- Dorton, Myers and Corley all testified the first time they learned that the Employer intended to challenge Dorton and Corley's votes was either the night before or the morning of the election (TR 586-587, 615-616, 749-754).
- Bender testified that he rewrites his notes into a summary to ensure accuracy and that during the April 30, 2015 meeting he explained the entire challenge process to the eligible voters (TR 471-474). Bender's summary, however, does not reflect any discussion of his lengthy explanation of the challenge process as described at hearing (EX-27).
- Portions of the summary are drafted in the wrong tense (TR 461-463).

Regardless of whether notes are dated April 21, 2015 or April 30, 2015, an examination of the uncontroverted record evidence leads to one inescapable conclusion: The summary constitutes fabricated evidence. More specifically, the Union knew that race was mentioned as a basis for the Employer's decision to challenge the ballots of Corley and Dorton during a phone call between Smith and eligible voters the night before the election. The Union further knew that Smith did not address the racial allegations or refute them in any way. Therefore, in order to argue that said conversation never took place the Union fabricated EX-27 so that the Union could argue that the issue of the challenged ballots came up during the Union meeting and the Union addressed said issue consistent with applicable law and in a non-coercive manner. Based on the Union's fabrication of EX-27, the Employer requests all possible adverse inferences be found relating to the summary as well as for any and all other relief including, but not limited to, reopening the record to further establish that the Union produced fabricated evidence in response to an Employer Subpoena.

2. The Union Failed To Produce The Signed Receipt From Applebee's.

At hearing, Bender testified that the meeting he conducted with the eligible voters took place on April 30, 2015 at Applebee's. In support of his position, Bender submitted an unsigned receipt for a meal at Applebee's dated April 30, 2015. Bender, however, also admitted submitting a signed receipt to the Teamsters Union regarding dinner at Applebee's and said receipt was requested by the Employer and Hearing Officer on several occasions. Despite admitting that a signed receipt exists, the Union failed to produce the signed receipt. The only logical explanation for the Union's refusal to produce the signed receipt is that, similar to his summary, the receipt submitted by Bender was fabricated or it contained information adverse to the Union's position. As such, Employer requests all possible adverse inferences be drawn relating to the failure to produce the signed receipt.

3. The Union Failed To Produce A Legible Copy Of Alvelais' Notes.

In response to the Employer's Subpoena, the Union produced an illegible copy of Stacey Alvelais' notes referencing Dorton's conduct at work. These illegible notes were admitted into evidence as EX 35. During the hearing, both Counsel for the Employer and the Hearing Officer made numerous requests for the Union to produce a legible copy of Alvelais' notes. Counsel for the Employer even agreed to accept a picture of the legible notes sent via a smartphone. Initially, the Union claimed that a legible copy of the notes had been misplaced in Alvelais' office. On the fourth day of hearing, Counsel for the Union stated that a legible copy of the notes still had not been located but that she was willing to make an offer of proof as to the contents of the notes. Upon realizing the absurdity of her position, Counsel took the position that a legible copy of the notes had been located at Alvelais' house but that the Union still did not have a copy to produce. At the time the hearing concluded for the week on Friday, June 5, 2015

the Union still had not produced a legible copy of the notes. The hearing was scheduled to reconvene on Tuesday, June 9, 2015. At the time the hearing reconvened the Union, despite having three days to secure a copy or even a picture of the legible notes, still refused to produce a legible copy of the notes.

The Union's refusal to produce a legible copy of the notes or even a picture of the legible notes in a response to a properly served Employer Subpoena cannot be condoned or excused. Essentially, the Union made a decision to ignore well-established NLRB procedure and made a mockery of the hearing. The only logical explanation for the Union's conduct is that the notes contained evidence contrary to the Union's position and supportive of the Employer's position that Dorton is a supervisor. Therefore, the Employer requests that an adverse inference be drawn from the Union's repeated failure to produce available evidence and that the Hearing Officer find that the notes contain references to Dorton's supervisory status over entire dispatch office, including the fact that Dorton supervises Adela Garcia.

4. The Union Failed To Produce Alvelais To Testify.

In addition to failing to produce a legible copy of Alvelais' notes, the Union refused to comply with the Employer's properly served Subpoena Ad Testificandum to Alvelais. In this respect, the Union initially stated that Alvelais was out of town on business. As the hearing progressed, the Union stated that Alvelais would not be available to testify until Tuesday, June 9, 2015. Ultimately, the hearing was continued until June 9, 2015 but despite the Union's prior representation that Alvelais would be available to testify on said date, the Union refused to produce Alvelais.

The Union's refusal to produce Alvelais to testify in a response to a properly served Employer Subpoena cannot be condoned or excused. Essentially, the Union made a decision to

ignore well-established NLRB procedure and made a mockery of the hearing. The only logical explanation for the Union's conduct is that Alvelais would have testified in a manner that is contrary to the Union's position and supportive of the Employer's position that Dorton is a supervisor. Therefore, the Employer requests that an adverse inference be drawn from the Union's repeated failure to produce Alvelais to testify and that the Hearing Officer find that the notes contain references to Dorton's supervisory status over entire dispatch office, including the fact that Dorton supervises Adela Garcia.⁸

F. The Union Witnesses' Testimony Is Not Credible.

When making credibility determination, both the Board and the Courts consider several factors regarding the testimony of the witnesses at a hearing. Although not identified by name, the Board and the Courts generally consider seven factors significant in making credibility determinations. First, the Board and the Courts consider the consistency of the witness' testimony. Underwriters Laboratories Inc. v. NLRB, 147 F.3d 1048, 1053 (9th Cir. 1998). There are several significant aspects of the consistency factor. First, the fact-finder must determine whether the witness' testimony is inherently consistent. In other words, does the witness's story remain the same throughout the duration of the testimony? Also, the fact-finder must determine whether a witness' testimony is consistent with prior statements of the witness.

Second, the fact-finder should consider the demeanor of the witness. *Id.* Specifically, fact-finders have looked to the witness's behavior on both direct and cross examination, evasiveness, accuracy, shiftiness, and discomfort on the stand. *Id.*; Suburban Trials In Joseph Covino, 326 NLRB No. 123 (1998); Lason Community Hospital, 278 NLRB No. 53 (1986); Paragon Paint Corp., 317 NLRB No. 101, 763 (1995).

⁸ It is the Employer's position that Ms. Alvelais, as the Union's Business Agent, has vast knowledge of the Dispatch Office and Ms. Dorton's supervisory authority over employees, including the drivers and office staff, such as Ms. Adela Garcia.

Third, the fact-finder must look to the incentive of the witness testifying. Grand Central Partnership, 1997 NLRB LEXIS 983 (1997) (citing Stanford Realty Associates, 306 NLRB 1061, 1064 (1992)). Another term for incentive is motive. Specifically, the fact-finder must consider whether the person providing testimony has an incentive to provide truthful testimony or false testimony. An example relevant to this case is whether that witness is in fear that they will suffer some sort of retaliation for testifying in a particular manner. That fear, therefore, may lead the witness to testify in an untruthful manner.

Fourth, fact-finders also consider the logic of the testimony. Therma King Corporation, 247 NLRB No. 48, 304 (1980). Simply stated, if the testimony of the witness does not make logical sense, then the testimony should not be accorded any credit.

Fifth, the fact-finder must consider whether the testimony is consistent with admitted facts. Sixth, the fact-finder is required to look to the inherent probabilities of what took place and draw all reasonable inferences therefrom. Services Employees International Union, 322 NLRB No. 66 (1996). Finally, and significantly, fact-finders look at the volume of the testimony and whether that testimony has been corroborated by the testimony of other witnesses. American Wire Products, Inc., 313 NLRB No. 156 (1994); Standard Motor Products, Inc., 265 NLRB No. 68 (1982); Plan Building Services, Inc., 318 NLRB No. 107 (1995).

1. Michelle Dorton

Dorton testified in an evasive fashion and she demonstrated a willingness to be less than truthful throughout her testimony. For example, when Dorton was initially asked if she communicated via text message with the Union regarding the organizing attempt in 2015, Dorton answered “no” (TR 31). Thereafter, when Dorton was asked to review EX 2 – an exhibit containing a series of text messages exchanged between Dorton and Smith – Dorton

conveniently remembered exchanging text messages with Smith (TR 31-33). Another example of the evasive nature of Dorton's testimony is the fact that the first time she testified Dorton stated that the only thing she ever said to Myers about the unionization was to follow her heart (TR 51). The second time Dorton testified, however, in response to questions from the Union's Counsel, Dorton recalled several additional conversations with Myers about unionization (TR 754-756). Yet another example of Dorton's willingness to lie is her testimony regarding her job title. During her initial testimony, Dorton admitted having a name tag hanging from her computer that identified her as the head dispatcher (TR 20). The second time Dorton testified, however, she denied having such a name tag (TR 762). It was only after Counsel for Employer read Dorton her initial testimony that she admitted having the name tag with the title of Head Dispatcher (TR 762 -763). Finally, Dorton expressly testified that from January 2015 through May 2015, Dorton never covered a driver's route unless she received a signed copy of a completed EX 3 (TR 76-77). Subsequently, once Dorton realized her testimony was not consistent with her position that she never approved time off, she changed her testimony and stated that there were occasions where she would cover routes even if she did not have a completed and signed EX-3 relating to the route.

Dorton's testimony was also inconsistent with the testimony of other witnesses regarding how the Union secured signed authorization cards during the 2015 organizational effort. At hearing, Dorton testified that she received authorization cards from an unnamed driver and passed out the cards to the staff (TR 41-43). According to Dorton, after members of the staff signed the cards, they returned the cards to Dorton and Dorton gave the signed authorization cards back to the unnamed driver (TR 41-43). In sharp contrast, other witnesses, including Smith, testified that Smith passed out the authorization cards at the Union meeting at TOGO's.

In short, Dorton was not a credible witness and her testimony should be rejected to the extent it is inconsistent with the testimony of the Employer's witnesses.

2. Rodney Smith

The testimony of Smith was rambling and in many instances not believable. In addition, Smith's testimony was inconsistent with Bender's testimony about how much Bender was involved in the organizing of the Company's employees. According to Smith, Bender was just as involved as Smith in the organizing effort (TR 336). In sharp contrast, Bender testified that his only involvement in the organizing was facilitating one meeting for Smith because Smith was not available (TR 467). If Smith is willing to lie about something so critical, the remainder of Smith's testimony cannot be credited.

3. Steve Bender

Bender's testimony regarding his summary was so incredible and dishonest that his testimony, as a whole, must be discredited.

IV. CONCLUSION

In conclusion, the Employer respectfully request that the Board set aside the election and order a new election be held in this matter. The evidence presented during clearly establishes that Ms. Dorton is a statutory 2(11) supervisor over drivers and employees who work in the dispatch office, including Adela Garcia. The facts presented at hearing also establish that Ms. Dorton utilized her supervisory authority and threatening and coercive statements to induce eligible voting employees, including Adela Garcia, to sign union authorization cards. Such conduct had a material effect on the outcome of the May 8, 2015 secret ballot election with a one (1) vote margin of victory for the petitioning labor organization.

In addition, the Board should find the Union's failure to properly address and/or repudiate a statement made by an employee that racism was the Employer's reasoning for challenging Ms. Dorton and Ms. Corley's vote, is equivalent to the Union endorsing such statements. In turn, making such statement injecting race into the Employer's lawful right to challenge voters attributable to the Union. Lastly, the Board should take negative inferences against the Union for its failure and/or refusal to produce the original receipt, Ms. Alvelais, the illegible documents produced by the Union, and Mr. Bender's fabricated summary of notes. Therefore, the Board should find that as a result of the unlawful conduct by Ms. Dorton, the employees' freedom of choice materially affected the outcome of the election, requiring the setting aside of the May 8, 2015 Board conducted secret ballot election.

Respectfully submitted,

McMAHON BERGER

/s/ Geoffrey M. Gilbert, Jr.
Geoffrey M. Gilbert, Jr.
Dean Kpere-Daibo
2730 North Ballas Road, Suite 200
St. Louis, Missouri 63131
(314)567-7350
(314)567-5968 (fax)
gilbert@mcmahonberger.com
dkd@mcmahonberger.com

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of June, 2015, served an original and one (1) copy of the foregoing via the National Labor Relations Board's electronic filing system addressed as follows:

George P. Velastegui
Regional Director
Region 32
National Labor Relations Board
1301 Clay Street, Suite 300N
Oakland, CA 94612

I hereby further certify that I have this 18th day of June, 2015, served a true and correct copy of the foregoing on the following via Electronic Mail addressed as follows:

Dalisai Nisperos, Esq.
Beeson, Tayer & Bodine
Ross House, Suite 200
483 Ninth Street
Oakland, CA 94607

/s/ Geoffrey M. Gilbert, Jr.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

DURHAM SCHOOL SERVICES, L. P.

Employer

and

Case 32-RC-150090

TEAMSTERS LOCAL 853, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHANGE TO
WIN

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

On May 8, 2015 an agent of Region 32 conducted an election among certain employees of the Employer. A majority of employees casting ballots in the election voted in favor of representation by the Union. The Employer contests the results of the election, claiming that head dispatcher Michelle Dorton, an alleged supervisor and an alleged agent of the Union, and other agents and/or representatives of the Union, engaged in conduct warranting setting aside the election. Specifically, the Employer contends that Dorton engaged in coercive prounion conduct including soliciting employees to sign union authorization cards. The Employer further alleges that agents or representatives of the Union led employees to believe that the Employer's challenge of certain ballots was racially motivated, thereby interfering with employees' free choice in the election.

After conducting the hearing and carefully reviewing the evidence and the arguments made by the parties, I have concluded that even assuming Dorton is a statutory supervisor, the Employer has failed to prove that she supervises any of the eligible voters, and that the evidence is insufficient to establish that Dorton's prounion conduct would have reasonably coerced the free choice of employees who she does not directly supervise. I have also concluded that the Employer has failed to prove that Dorton is an agent of the Union, and further, that the evidence is insufficient to establish that there was any suggestion during the critical period that the Employer's decision to challenge certain ballots was racially motivated. I am therefore recommending that the Employer's objections be overruled in their entirety.

After recounting the procedural history, I discuss the parties' burdens with regard to establishing an agency relationship, as well as the Board's standard for setting aside elections. Next I briefly describe the Employer's operation and then address the supervisory status of Dorton. Finally, I discuss each objection.

PROCEDURAL HISTORY

Based on a petition that was filed on April 14, 2015, and pursuant to a Stipulated Election Agreement, an election was held on May 8, 2015, to determine whether a unit of employees of

Durham School Services, L. P.
Case 32-RC-150090

Durham School Services, L.P., (the Employer) wished to be represented for purposes of collective bargaining by Teamsters Local 853, International Brotherhood of Teamsters, Change to Win (the Union). The petitioned-for unit consists of:

All full-time and regular part-time routers, payroll department employees, administrative employees, and dispatchers employed by the Employer at its facilities located at 27577 Industrial Boulevard, Suite A, Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California; excluding employees represented by a labor organization, professional employees, confidential employees, managers, guards, and supervisors as defined by the Act.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that of the approximately seven eligible voters, four ballots were cast for the Union and two ballots were cast against representation. There was one non-determinative challenged ballot. Thus, a majority of the valid ballots were cast in favor of representation by the Union.

Objections were timely filed. The Regional Director for Region 32 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. As the hearing officer designated to conduct the hearing and to recommend to the Regional Director whether the Employer's objections are warranted, I heard testimony and received into evidence relevant documents on June 2, 3, 4, 5, and 9, 2015. The parties were granted permission to file post-hearing briefs, and the Employer and the Union each timely filed briefs which have been duly considered.

THE EMPLOYER'S ALLEGATION CONCERNING MICHELLE DORTON'S AGENCY STATUS

During the hearing in this matter, the Employer specifically alleged that Dorton is both an agent of the Union and a Section 2(11) supervisor. In its brief, the Employer makes no contention that Dorton is an agent of the Union, and it appears that the Employer may have abandoned that theory. Because the Employer did not withdraw its allegation that Dorton is an agent of the Union, however, I nonetheless address it briefly here.

Legal Standard for Agency Status

The burden of proving an agency relationship rests with the party asserting its existence, both as to the existence of the relationship and as to the nature and extent of the agent's authority. *Millard Processing Services*, 304 NLRB 770, 771 (1991); *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948). The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party.

Agency is not established merely on the basis that employees are engaged in "vocal and active union support." *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988); see also *Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983). Similarly, attending organizing meetings

Durham School Services, L. P.
Case 32-RC-150090

or soliciting cards on behalf of a union do not, standing alone, render employees agents of a union. *Health Care and Retirement Corporation of America v. N.L.R.B.*, 255 F.3d 276 (6th Cir. 2000).

Record Evidence and Recommendation

As discussed more fully below, the record reflects that Dorton was an open union supporter, and Dorton admitted that she offered union authorization cards to employees. As indicated above, however, being an active union supporter and soliciting authorization cards does not render Dorton an agent of the Union. The Employer also presented evidence that Dorton offered minor assistance to the Union with its organizing campaign. Specifically, the Employer presented evidence establishing that Dorton communicated with the Petitioner's business agent, Rodney Smith, via text message, since at least April 1, 2015. Dorton inquired whether the petition had been filed, provided Smith with the names and titles of management employees, and advised Smith about times and places that employees would be available to meet. There is no evidence, however, that Smith communicated exclusively with Dorton about the Union's organizing campaign, or that Dorton exclusively relayed information from the Union back to the eligible voters. On the contrary, administrator Shirley Myers testified that she heard about union meetings from Dorton as well as other employees. Furthermore, Smith testified that he communicated with three or four employees about where and when to schedule meetings. In these circumstances, there is insufficient record evidence to warrant a conclusion that employees would reasonably believe that Dorton was authorized to act on behalf of the Union.

I conclude that the Employer, who bears the burden of proof, has failed to establish that the Union gave Dorton authority to act on its behalf or that employees could reasonably conclude that Dorton was acting on the Union's behalf when she engaged in the conduct alleged to be objectionable. I therefore find that Dorton is not an agent of the Union, and her alleged objectionable conduct is not attributable to the Union.

THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

Durham School Services, L. P.
Case 32-RC-150090

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

THE EMPLOYER'S OPERATION

The Employer operates a school bus company. The instant matter involves the Employer's Hayward, California, facility, which is managed by General Manager Ron Mahler. Below Mahler are Operations Supervisor Sandra Wilson, Safety Supervisor Eileen Noonan, and Maintenance Supervisor Jeremy Escobar. The Employer maintains a satellite office in Livermore, California, which is supervised by Site Supervisor Roxanne Liette, who also reports to General Manager Mahler. There are about 105 drivers employed at the Hayward facility, who are already represented by the Union.

There are approximately seven eligible voters in the petitioned-for unit. Router Susan Robbins works at the Livermore office, and the remaining employees work at the Hayward facility. Administrator Shirley Myers handles accounts receivable and accounts payable, and provides some human resources support. Darlene Corley is the payroll assistant. Aside from Robbins, there are two additional routers, Candace Comandao and Sherry Head. The routers' basic duties are to gather information from school districts about school bell schedules, any special equipment that is needed on the buses, and whether there are children who have special needs, and to plan the routes for the drivers. Adela Garcia and Michelle Dorton are the dispatchers. Dispatchers are responsible for making sure that drivers get out of the yard on time and pick up and deliver the children on time, and to ensure that all routes are covered. Dorton is the lead dispatcher. The Employer contends that Dorton is a statutory supervisor.

Legal Standard for Supervisory Status

Supervisory status under the National Labor Relations Act depends upon whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of establishing supervisory status rests on the party asserting that status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 7110712 (2001); *Modesto Radiology Imaging*,

Durham School Services, L. P.
Case 32-RC-150090

Inc., 361 NLRB No. 84 (2014); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). To “assign” refers to the act of “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period) or giving significant overall duties to an employee.” *Oakwood*, 348 NLRB at 689. “Responsibly to direct” requires that “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Id.* at 692.

Record Evidence Regarding Dorton’s Supervisory Status

For reasons discussed below, I will not provide a detailed summary of the record evidence regarding Dorton’s supervisory authority with respect to the drivers. The record evidence tends to establish that Dorton is authorized to approve time off for drivers, although the Union disputes that Dorton is authorized to approve time off requests for any employee. Although drivers bid on their routes, Dorton is responsible for ensuring that routes get covered when a driver is absent from work or when the route needs to be covered for any other reason. The Union presented evidence tending to show that Dorton’s discretion in that regard is limited to a certain extent because the Employer employs cover drivers to fill those routes, routes are frequently covered by soliciting volunteers, and any decision as to who can cover a route is limited by factors such as whether the route that needs to be covered requires special equipment or training for special-needs children. The record contains limited evidence that Dorton has verbally counseled drivers about their performance, but there is no evidence that Dorton has ever disciplined a driver. The Employer presented evidence that it has met with the Union to discuss the Union’s concerns about Dorton’s treatment of drivers on at least three occasions, including in late 2014, around January 2015, and around March or April 2015.¹

With respect to the employees in the petitioned-for unit, the parties stipulated that Dorton is not the supervisor of administrator Shirley Myers or router Candace Camandao, and the Employer presented no evidence that Dorton supervises the other routers or the payroll assistant. The Employer argues, however, that Dorton supervises dispatcher Adela Garcia. The Employer did not present Garcia as a witness, but presented evidence from other employees regarding their

¹ The Union failed to comply with a subpoena ad testificandum of business agent Stacy Alvelais, who represented the Union during the meetings where Dorton was discussed. The Union also failed to provide a legible copy of notes, which it produced pursuant to a subpoena, that were taken by Alvelais during a meeting with the Employer in which Dorton was discussed, even though the original notes were located by the Union during the hearing and the Employer agreed that it would accept a photograph of the document. The Employer has requested that I draw an adverse inference from the Union’s failure to produce Alvelais and/or a legible copy of Alvelais’ notes. Specifically, the Employer requests me to conclude that the notes contain references to Dorton’s supervisory status over the entire dispatch office. I do not agree that an adverse inference is warranted with respect to Dorton’s supervisory status over dispatch employees. Such an inference would be inappropriate given that none of the Employer’s witnesses testified that dispatch employees, who are not represented by the Union, were a topic of discussion during its meetings with Alvelais. Furthermore, as discussed below, I will be assuming for the purposes of my analysis that Dorton is a statutory supervisor with respect to the drivers, and the Union’s failure to present the subpoenaed evidence will not prejudice the Employer in that regard.

Durham School Services, L. P.
Case 32-RC-150090

observations of the working relationship between Dorton and Garcia. Administrator Shirley Myers testified that she has witnessed Dorton making statements to Garcia such as, "did you call that parent," "did you route those kids," "check the binder," and "make sure those buses are in," although Myers qualified her testimony by stating that she could not recall the statements "verbatim." Operations Supervisor Wilson testified that when Garcia takes calls from angry parents, she consults with her, not Dorton, about how they should be handled. Dorton generally denied having any supervisory authority over Garcia, or any other employees. For reasons explained below, I have found Dorton to be a less than reliable witness, and I do not rely on her testimony about supervisory status in making my determinations. Although the Employer presented extensive testimony and documentary evidence related to the approval of time off requests for drivers, there was no evidence presented regarding who approves time off for Garcia. The record reflects that Garcia is paid \$21.55 per hour, while Dorton is paid \$20.36 per hour.²

The Employer also presented evidence regarding Dorton's working relationship with a temporary employee and a driver, Paula Moncado, who was assigned to dispatch while she was on light duty, neither of whom are eligible voters. Operations Supervisor Wilson testified that Dorton "counseled" these employees by talking to them about how they handled phone calls, but Wilson did not provide any specific examples. Wilson also testified that she has the authority to override any counselings given by Dorton.

Moncado worked in dispatch from about January through May 2015, while she was on light duty as a result of an on the job injury. Moncado testified that Operations Supervisor Wilson instructed her to get her duties from Dorton while she was in dispatch, and that she regarded Dorton as her supervisor in dispatch. Moncado testified that Dorton would tell her to call parents and to pick things up off the printer, and that she heard Dorton tell another temporary dispatch employee to call parents. When Moncado requested time off, she turned her requests in to Dorton, who would tell her that the requests were subject to approval by management. Moncado's time off request slips were returned with Wilson's signature. Moncado testified that Dorton told her when she could leave to attend doctor's appointments related to her on the job injury, which she did while on the clock. Moncado further testified that Dorton orally reprimanded her on two occasions while she was in dispatch, once for having a personal conversation while she was on the clock, and once for not knowing whether she should ask a driver for an estimated time of arrival. After the second incident, Moncado became angry with Dorton and walked out. Moncado was not disciplined in connection with those incidents.

Recommendation Regarding Dorton's Supervisory Status

The record contains conflicting evidence over whether Dorton has the authority to assign and direct the drivers, and, if so, whether the exercise of that authority is merely routine or

² Employee Relations Manager Corina Nelson testified that Dorton asked for a pay raise because she was upset that she was making less than Garcia, whom she supervised. I accord little weight to that testimony because any evidence that Dorton regarded herself as a supervisor would be, at best, secondary indicia, which is insufficient on its own to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 731, n. 10 (2006); *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

Durham School Services, L. P.
Case 32-RC-150090

clerical in nature or requires the use of independent judgment. I find it unnecessary to resolve Dorton's supervisory status with respect to the drivers in order to dispose of the objections in this case, however, because even viewing the evidence of supervisory status in the light most favorable to the Employer, and concluding that Dorton meets the statutory definition of supervisor, there is insufficient evidence to conclude that Dorton's conduct reasonably interfered with employees' free choice in the election. In reaching this conclusion, I rely on the lack of record evidence to demonstrate that Dorton exercises supervisory authority over any of the eligible voters.

The Employer presented no evidence, and does not argue, that Dorton supervises the administrator, the payroll assistant, or the routers. The only unit employee who the Employer contends that Dorton supervises is dispatcher Garcia; however, the record does not contain any reliable evidence that Dorton has supervisory authority over Garcia. Myers' testimony that she has witnessed Dorton issue minor directions to Garcia is wholly insufficient to establish that Dorton supervises Garcia. Myers' vague and unspecific testimony establishes, at most, that Dorton issues routine instructions to Garcia. See *Sears Roebuck & Co.*, 292 NLRB 753, 754 (1989) (supervisory status is not established where work assignments are routine in nature). See also *Armstrong Machine Co., Inc.*, 343 NLRB 1149, 1150 (2004) (Board will not find supervisory status where the assignments are "routine" and not "based on anything other than the common knowledge, present in any small workplace, of which employees have certain skills and which employees work well together"); *Byers Engineering Corp.*, 324 NLRB 740 (1997) (authority to issue instructions and minor orders based on greater job skills does not amount to supervisory authority). In the instant case, it is not clear that Dorton doesn't issue minor guidance to Garcia as a result of her experience and expertise rather than any supervisory relationship. I therefore find that the Employer has not offered sufficient evidence to establish that Dorton supervises Garcia.

I credit Moncado's testimony that Wilson told her to get assignments from Dorton, that Dorton issued minor instructions and reprimands to Moncado, and that Dorton told Moncado when she could leave to attend doctor's appointments. Moncado impressed me as a credible witness because she came across as open and forthright in her testimony, she had a good recollection of the events she was questioned about, and the record establishes that she was not prepped by the Employer's counsel prior to her testimony. I do not find Moncado's testimony sufficient to find that Dorton exercises supervisory authority over the dispatchers, however, for the following reasons. First, Moncado is not a unit employee, but a driver who was assigned to work in dispatch on a temporary basis. In the absence of any testimony from Garcia, I cannot conclude that Moncado's temporary arrangement with Dorton is dispositive of whether Dorton exercises any supervisory authority over Garcia. In that regard, because Moncado was a driver who was only working in dispatch temporarily while she was on light duty, it follows that she would need guidance and instruction from Dorton where Garcia would not. The Board has found that isolated or temporary instances of actions which might otherwise be indicative of supervisory authority are generally insufficient to predicate a supervisory finding. *Volair Contractors, Inc.*, 341 NLRB 673 (2004); *Kanawha Stone Co.*, 334 NLRB 235 (2001). Second, and in any event, Moncado's testimony does not provide reliable evidence of supervisory status, for the following reasons. There is no evidence that Dorton's oral reprimands led to discipline or

Durham School Services, L. P.
Case 32-RC-150090

had any other impact on Moncado's employment status. See *Willamette Industries*, 336 NLRB 743 (2001) (evaluations that do not have any direct effect on employment status or tenure are not indicative of supervisory status). Indeed, Moncado was not even disciplined after she walked out on Dorton as a result of Dorton's reprimands. Additionally, the most reasonable reading of Moncado's testimony regarding her time off requests is that those requests were approved by Wilson, and not Dorton. And finally, Moncado's testimony that she was told to get her duties from Dorton is insufficient to establish supervisory status, because mere inferences or conclusionary statements without detailed, specific evidence are insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Furthermore, Moncado's testimony that Dorton issued her routine instructions to pick things up off of the printer and call parents, does not establish the independent judgment necessary to support a finding of supervisory status. For these reasons, I find that the Employer has not established that Dorton is a statutory supervisor of Garcia, or any other unit employees.

THE EMPLOYER'S OBJECTIONS AND MY RECOMMENDATIONS

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony.

Objections 1 and 2: Dorton's prounion conduct

Record Evidence

The record reflects that the Union met with unit employees on two occasions, and that both of the meetings were attended by all or nearly all of the unit employees except for router Susan Robbins, who works out of the Livermore facility. The first meeting, held at a Togo's restaurant on April 8, 2015, was led by Union business agent Rodney Smith. Smith testified that during the meeting, he passed out authorization cards to the employees and addressed any questions or concerns that they had about the Union. Smith testified that he did not hear Dorton make any comment to the effect that employees should sign the cards if they wanted to keep their jobs, but Smith also admitted that he stepped away from the group to place his food order and he could not hear the conversation at that time. I found Smith to be a reliable witness. Smith had a calm demeanor, and he seemed to be making a genuine effort to answer counsel's questions accurately. Smith volunteered many details when providing his answers and also volunteered when he was unable to recall something. I also noted that Smith was fully engaged with the Employer's counsel during questioning, and did not look to the Union's counsel for guidance. I therefore credit Smith's testimony.

The second meeting was held at an Applebee's restaurant on April 30, 2015. That meeting was led by business agent Steve Bender. Although Bender's notes reflect that the

Durham School Services, L. P.
Case 32-RC-150090

meeting took place on April 21, 2015, text messages between Dorton and Smith and a receipt from Applebee's establish that the meeting occurred on April 30. There is no objectionable conduct alleged to have taken place during the April 30 meeting.

Administrator Shirley Myers testified that she found out about union meetings from discussions with "all the girls," meaning the eligible voters at the Hayward facility, and that Dorton told her it was "important and that we needed to go." Myers testified that Dorton was a vocal union supporter, and that Dorton believed that the union was necessary to "secure our jobs." Myers testified that Dorton offered her an authorization card about two weeks before the first union meeting, but she didn't take it. Myers also testified that she had a conversation about the Union with Dorton in the breakroom on an unspecified date before the election. Myers asked Dorton about her feelings about the Union because she was trying to make up her mind which way to vote. Myers also asked Dorton if she voted no and the Union turned out to be a good thing, would Dorton or the group hold it against her. According to Myers, Dorton responded, "no, you can vote how you want, but it would always be in the back of my mind."³ Myers testified that during the first union meeting, while the employees were signing authorization cards, Dorton said, "If you want your job, you better sign this card." I found Myers to be a reliable witness. Although Myers appeared to be nervous, there was nothing in her demeanor that suggested that she was trying to hide anything. Myers answered the questions that were posed to her openly and indicated when she did not know or could not recall the answer to a question. I therefore credit Myers' testimony.

Dorton testified that whenever she talked to unit employees about the Union, she essentially told them only that they should "follow [their] heart[s]." I do not find Dorton's testimony to be altogether credible, for the following reasons. Dorton initially denied that she had ever exchanged any text messages with the Union. When she was presented with copies of text messages establishing that she had communicated with Smith on several different occasions about matters including the timing of meetings and whether the petition had been filed, she explained that she had "forgot[ten] all about this." I do not find it plausible that Dorton would forget about exchanging text messages, on multiple occasions, with the business agent who was attempting to unionize her department. Elsewhere in her testimony, Dorton responded to questioning by the Employer's counsel by stating that she did not know whether a driver with whom she had been in contact about the Union was a shop steward. When pressed, Dorton explained that she did know the answer to counsel's question, but she did not want to disclose the person's identity. At that point, I had already instructed the Employer's counsel, during a related line of questioning, that I would not require Dorton to disclose the employee's identity and information about the employee's Section 7 activities. Rather than being forthright and explaining that, consistent with my earlier instruction, she did not want to disclose the employee's identity, Dorton initially denied that she knew the answer to the question. In these circumstances, Dorton gave me the impression that she was willing to withhold information or to manipulate her testimony if she felt that she had a good reason for doing so. Therefore, I did not

³ Myers' testimony that Dorton talked about job security in connection with unionization and that Myers and Dorton talked about the Union in the breakroom was corroborated by Dorton. When questioned on cross-examination, Dorton recalled that she and Myers were together in the breakroom when Myers asked her why she wanted the Union, and Dorton replied "for me, it's job security."

Durham School Services, L. P.
Case 32-RC-150090

find Dorton to be a credible witness, and I only rely on those portions of her testimony that can be corroborated by other record evidence.

During the last week of April or first week of May, the Employer had at least three meetings with the eligible voters to discuss the Union. The meetings were attended by several managers, including General Manager Mahler, Operations Manager Wilson, Employee Relations Manager Corina Nelson, and Site Supervisor Roxanne Liette.⁴

Board Law

I assume for the purposes of my analysis, without finding, that Dorton meets the statutory definition of supervisor and that she supervises the drivers. In *Harborside Healthcare Inc.*, the Board set forth its standard for analyzing whether alleged supervisory prounion conduct upsets the requisite laboratory conditions for a fair election. The Board looks at two factors:

1. Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election, including (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct and (b) an examination of the nature, extent, and context of the conduct in question.
2. Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside, 343 NLRB at 909. The Board held that with respect to the supervisory solicitation of authorization cards, "absent mitigating circumstances," such solicitations have "an inherent tendency to interfere with the employee's freedom to choose to sign a card or not" and thus "may be objectionable." *Id.* at 910.

Recommendation

I first examine Dorton's alleged coercive solicitation of union cards through the statement "If you want your job, you better sign this card." I note that the alleged coercive statement was established by the testimony of only one employee, Myers, but as indicated above, I have credited her testimony. Under the first prong of *Harborside*, I find that there are

⁴ The fact of the meetings was established by the firsthand testimony of Dorton and the hearsay testimony of Bender, who testified that during his April 30, 2015, meeting with eligible voters, the employees were complaining that they had been in antiunion meetings "all week." Although Bender's testimony is hearsay, and, although, as explained elsewhere in this decision, I have found the testimony of Dorton and Bender to be less than reliable, I find that the consistency of their accounts that the antiunion meetings took place renders that particular testimony reliable. In any case, the Employer admits in its brief that it conducted an antiunion campaign, and that it held meetings with employees to discuss the Union.

Durham School Services, L. P.
Case 32-RC-150090

mitigating circumstances which establish that Dorton's statement did not reasonably tend to interfere with employees' freedom of choice whether to sign an authorization card or vote in favor of the Union. Assuming that Dorton is a supervisor, she is a low-level supervisor, at best. There is no evidence that Dorton has any involvement in hiring or firing, and there is no evidence that Dorton has ever disciplined employees. Dorton therefore has no power to carry out a threat of job loss. In these circumstances, an employee would reasonably interpret Dorton's comment as an expression of her own view that unionization would lead to job security rather than a threat to retaliate against employees who did not support the Union. Such an interpretation would be consistent with Dorton's past expression that job security was, in her view, a benefit of unionizing.

Furthermore, the record does not establish that any of the eligible voters report to Dorton, and supervisory solicitation is not objectionable where the soliciting supervisor has no authority over the employee being solicited. *Glen's Market*, 344 NLRB 294 (2005) (where supervisors' prounion activities were not directed toward any employees over whom they exercised supervisory authority, their conduct could not have reasonably coerced or interfered with employees' free choice in the election). Compare *SNE Enterprises, Inc.*, 348 NLRB 1041 (2006) (setting aside election where leadpersons directed their solicitation of authorization cards and other prounion activity towards subordinates over whom they directed work and assigned work on a daily basis and to whom they issued written warnings); *Millard Refrigerated Services*, 345 NLRB 1143 (2005) (setting aside election based on the supervisory solicitation of cards, where much of the prounion activity was directed at direct subordinates of a group of prounion supervisors working together). For the foregoing reasons, I find that even assuming Dorton is a supervisor, the evidence is insufficient to establish that her conduct would have reasonably coerced or interfered with employees' free choice in the election.⁵

I also find that Dorton's lesser prounion conduct – encouraging employees to attend union meetings, her own attendance at union meetings, and her comments to employees that she thought unionization would lead to job security – would not have a reasonable tendency to interfere with the free choice of the eligible voters because she did not supervise them. *Glen's Market*, above. Moreover, the Board has determined that similar conduct was not objectionable even when directed at direct subordinates. See *Terry Machine Co.*, 332 NLRB 855 (2000) (supervisors did not interfere with employees free choice by attending union meetings and encouraging supervisees to attend union meetings); *Northeast Iowa Telephone Co.*, 346 NLRB 465 (2006) (even assuming managers had statutory supervisory authority over employees, their prounion conduct in attending union meetings and talking to employees about issues that the union could help resolve was not objectionable).

⁵ The Employer does not specifically allege that Dorton's conduct in offering employees authorization cards at any other time is objectionable, and the evidence does not clearly establish whether Dorton offered an authorization card to any unit employee other than Myers. In any event, consistent with *Glen's Market*, I find that Dorton's conduct in offering an authorization card to Myers, whom she did not directly supervise, did not have a reasonable tendency to interfere with her free choice in the election.

Durham School Services, L. P.
Case 32-RC-150090

Finally, I turn to Dorton's comment to Myers that her lack of support for the union would be "in the back of her mind." I initially note that Dorton's comment was prefaced with the assurance that Dorton would not hold a "no" vote against Myers and that Myers should vote how she wanted. In any event, because Dorton has no supervisory authority over Myers, her comment would not have a reasonable tendency to interfere with employee free choice.

Turning to the second *Harborside* factor, I note that the record establishes that the Employer ran an antiunion campaign, including by holding a number of meetings hosted by its entire management team the week before the election, and I recognize that the Board considers this to be a mitigating circumstance. E.g., *Laguna College of Art and Design*, 362 NLRB No. 112 (2015). A second mitigating circumstance is the significant lapse of time – a month – between Dorton's comment about signing authorization cards and the employees' vote in the election. But given the small size of the unit and the narrow margin of the election, wherein a single vote could have changed the outcome, I conclude that any coercive conduct could have materially affected the outcome of the election. I therefore find that the second prong of *Harborside* would weigh in favor of setting the election aside in this case if the first prong of *Harborside* were satisfied. Because I have concluded that the evidence is insufficient to show that Dorton's conduct would have reasonably tended to interfere with employees' free choice in the election, however, I recommend that Objections 1 and 2 be overruled.

Objections 3 and 4: The Union's communications with eligible voters regarding challenged ballots

Record Evidence

Administrator Shirley Myers, who attended both union meetings, testified that she learned the Employer intended to challenge the votes of Dorton and payroll assistant Darlene Corley on the day of the election, when Corley called Myers into her office and told her that she and Dorton had been challenged because the Employer thought they were supervisors. Myers recalled that on the day of the election, Dorton was saying things like "how can they do this?" and "I didn't know I was a supervisor," but Myers could not recall whether those comments were made before or after the employees had voted. Myers further testified that after the employees had voted, while the votes were being tallied and the employees were waiting to be informed of the results of the election, she heard router Candace Comandao say, "I think it's a race thing. The only two black females out of the group they call supervisors." Myers recalled that she responded "that is bullshit" and that Dorton responded "no, I don't think it's a race thing."

Camandao attended both union meetings. She testified that she first learned that the Employer intended to challenge the votes of Corley and Dorton the night before the election, when she overheard a telephone conversation on speakerphone with Dorton and router Sherry Head. Camandao stated that Dorton "was very upset as well as Sherry and myself," and that Head was talking loud and sounded upset. Camandao testified that she asked what was going on, and that Dorton and Head told her that the Employer was going to challenge their votes. Camandao gave conflicting accounts about whether the subject of supervisory status was discussed. Camandao initially testified that she didn't know if she knew about the supervisory allegation at that time. When I asked Camandao if she could recall any further details about the

Durham School Services, L. P.
Case 32-RC-150090

conversation, she said that they talked about why Head and Dorton couldn't vote, and that she didn't understand that they were supervisors. Camandao testified that based on the conversation, she decided to change her vote from a no vote to a yes vote. Camandao explained that she was very upset because she "didn't know how you cannot have somebody vote in American in an election in America" and that she didn't understand at that time that a challenged vote would be placed in a sealed envelope and set aside.

Union business agent Bender testified that the challenge process came up during his April 30, 2015, meeting with unit employees, and that he explained the challenge process to the employees. Bender took notes during the meeting, but during the hearing, the credibility of Bender's notes was called into question. Bender admitted that he no longer had the original notes in his possession and that he had copied his notes onto another piece of paper and destroyed the originals. Bender explained that his original notes contained incomplete "chicken scratch" and "half words," and that it was not uncommon for him to rewrite his notes into a more legible and complete summary for later reference. While I find Bender's explanation for rewriting his notes to be plausible, Bender could not explain why he didn't correct the date of the meeting, which was recorded on his notes as April 21, 2015, but actually took place on April 30, 2015. I find that the date discrepancy casts some uncertainty onto the reliability of Bender's notes as an accurate record of what transpired at the meeting. The reliability of Bender's testimony is further called in to question by the testimony of employees Myers and Camandao, who attended both union meetings and do not recall the subject of challenged ballots coming up. Accordingly, I do not credit Bender's testimony to the extent that it conflicts with other record testimony, and I rely on Bender's testimony only to the extent that it can be corroborated elsewhere in the record. I therefore discredit Bender's testimony that he explained the challenged ballot procedure to employees during the April 30 meeting.

Union business agent Smith testified that he recalled a telephone conversation, possibly over speakerphone, with Dorton and at least one other unit employee, whose name he could not recall, about two days before the election. Smith recalled that the subject of challenges came up during that conversation and that he explained that voter challenges were a normal practice and that both unions and employers challenge the eligibility of voters. Smith did not recall whether any allegations were made that the Employer was challenging a ballot or ballots for racist reasons, but he admitted that it was possible.

Board Law

The Board applies an objective test when evaluating alleged objectionable conduct and "the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct." *Picoma Industries*, 296 NLRB 498, 499 (1989), quoting *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980), *enfd.* 649 F.2d 589 (8th Cir. 1981). The focus is on the reasonableness of an employee's fears as reflected by objective facts. *Electra Food Machinery*, 279 NLRB 279, 280 (1986).

Durham School Services, L. P.
Case 32-RC-150090

Recommendation

Contrary to the Employer's argument, the record contains no evidence that that an agent or representative of the Union, or even any employee for that matter, speculated about racist motivations for the Employer's ballot challenges until after the employees had cast their ballots. Camandao was unable to provide any specific testimony about what she overheard in the telephone conversation the night before the election that caused her to become upset and change her vote, and she never mentioned race in her testimony. Instead, she offered conclusory observations that Corley and Dorton were upset. Camandao's testimony focused on how she felt rather than on any specific statements that were made, and Camandao was unable to provide details about the conversation. Accordingly, Camandao's testimony is only probative of her own subjective reaction to the conversation she overheard, and does not establish that any objectionable conduct took place.

Furthermore, Smith did not recall the subject of race coming up when he discussed ballot challenges with employees, although he admitted that it was possible. The only person who recalled any implication being made that the Employer's challenges were racially motivated was Myers, and she attributed the comments to Comandao and placed the timing of those comments after the votes were cast. Accordingly, the contains no evidence that employees' votes could have been influenced by the suggestion that the Employer's challenges were motivated by racial discrimination. I therefore recommend that Objections 3 and 4 be overruled.

CONCLUSION

I recommend that the Employer's objections be overruled in their entirety. The Employer has failed to establish that its objections to the election held on May 8, 2015, reasonably tended to interfere with employee free choice. Therefore, I recommend that an appropriate certification issue.

APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 32 by July 14, 2015. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, Region 32, 1301 Clay Street, Suite 300N, Oakland, CA 94612-5224.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business at 5 p.m. Pacific Time on the due date. If E-Filed, it will be considered timely if the transmission of the entire

Durham School Services, L. P.
Case 32-RC-150090

document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: June 30, 2015

/s/ Jennifer Kaufman
JENNIFER D. KAUFMAN
Hearing Officer

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

In the Matter of:)	
)	
DURHAM SCHOOL SERVICES, L.P.,)	
)	
Employer,)	
)	
and)	Case No. 32-RC-150090
)	
TEATERS LOCAL 853,)	
INTERNATIONAL BROTHERHOOD)	
OF TEATERS, CHANGE TO WIN,)	
)	
Petitioner.)	

**EMPLOYER DURHAM SCHOOL SERVICES, L.P.'S EXCEPTIONS TO
THE HEARING OFFICER'S OFFICIAL REPORT ON OBJECTIONS**

COMES NOW, Durham School Services L.P., ("Durham" or "Employer" or "Company"), by and through its undersigned counsel, pursuant to Section 102.69(c)(1)(iii) of the National Labor Relations Board Rules and Regulations, and herewith submits its Exceptions to the Hearing Officer's Official Report on Objections in its entirety. For the following reasons, the Regional Director should reject the Hearing Officer's Report and sustain the Employer's Objections:

1. **Exception 1:** The Employer takes exception to the Hearing Officer's Report on Objections in its entirety.
2. **Exception 2:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred in failing to determine whether Dorton is a supervisor of the drivers under Section 2(11) of the Act.

3. **Exception 3:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred in determining Dorton is not a 2(11) Supervisor with regard to the dispatch employees, including Garcia.

4. **Exception 4:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred in ignoring competent record evidence in determining that head dispatcher Dorton is not a Section 2(11) supervisor.

5. **Exception 5:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred in determining that Moncado's credible testimony was not sufficient to establish that Dorton is a Section 2(11) supervisor with respect to the dispatch employees.

6. **Exception 6:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred in refusing to draw a negative inference against the Union regarding its failure to produce a legible copy of Alvelais' notes relating the Dorton's supervisory status over dispatch employees.

7. **Exception 7:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred in refusing to draw a negative inference against the Union regarding Alvelais' illegible notes relating the Dorton's supervisory status over dispatch employees.

8. **Exception 8:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred in refusing to draw an adverse inference against the Union regarding the Union's refusal to produce Alvelais to testify at hearing relating Dorton's supervisory status.

9. **Exception 9:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred in not concluding Dorton's pro-union threatening and coercive conduct is objectionable supervisory taint.

10. **Exception 10:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred in not concluding Dorton's threatening and coercive statement to eligible voters reasonably interfered with the employees' freedom of choice whether to sign an union authorization card or not.

11. **Exception 11:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred in failing to conclude Dorton's solicitation of signatures for union authorization cards in of itself is objectionable conduct.

12. **Exception 12:** The Employer takes exceptions to the Hearing Officer's Report on Objections because the Hearing Officer's subjective conclusion that Dorton's coercive statement could not be taken as a threat is not based in facts or law.

13. **Exception 13:** The Employer takes exceptions to the Hearing Officer's Report on Objections because the Hearing Officer erred by failing to conclude Dorton's conduct did not interfere with the freedom of choice to the extent it's materially affected the outcome of the election.

14. **Exception 14:** The Employer takes exceptions to the Hearing Officer's Report on Objections because the Hearing Officer erred by not finding that the union either told eligible voters that the employer illegally challenged Dorton and Corley's vote because of their race or that the union failed to repudiate an employee's statement that the employer illegally challenged Dorton and Corley's vote because of their race.

15. **Exception 15:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred in not taking an adverse inference against Bender's fabricated summary of notes.

16. **Exception 16:** The Employer takes exception to Hearing Officer's Report on Objections because the Hearing Officer erred by refusing to apply the competent evidence supporting the Employer's Objections.

17. **Exception 17:** The Employer takes exception to the Hearing Officer's Report on Objections because the Hearing Officer erred by failing to apply the applicable law regarding whether the supervisor's conduct must be targeted towards one that is the supervisor's direct subordinate to be objectionable supervisory taint.

WHEREFORE, for the reasons set forth in the Company's Exceptions, the Hearing Officer's factual conclusions and credibility resolutions are without support in the record, and therefore, the Regional Director should: (1) reject the Hearing Officer's recommendation to overrule the Employer's objections; (2) reject the Hearing Officer's recommendation that a Certification of Representation be issued; (3) set aside the May 8, 2015 election; and order that a new election be held.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/ Geoffrey M. Gilbert

Geoffrey M. Gilbert

Dean Kpere-Daibo

2730 North Ballas Rd, Suite 200

St. Louis, Missouri 63131-3039

Telephone: (314) 567-7350

Facsimile: (314) 567-5968

Attorneys for Employee

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of July, 2015, a true and correct copy of the above document was filed via electronically on the Board's website with the following individual:

George Velastgui
Regional Director
National Labor Relations Board, Region 32
1301 Clay St., Suite 300N
Oakland, CA 94612-5224

/s/ Geoffrey M. Gilbert

I further certify that on the 14th day of, July, a true and correct copy of the above document was served via electronic mail upon the following individuals:

Dalisai Nisperos
Beeson, Tayer & Bodine
483 Ninth Street, 2nd Floor
Oakland, CA 94607
dnisperos@beesontayer.com

/s/ Geoffrey M. Gilbert

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

In the Matter of:)	
)	
DURHAM SCHOOL SERVICES, L.P.,)	
)	
Employer,)	
)	
and)	Case No. 32-RC-150090
)	
TEAMSTERS LOCAL 853,)	
INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS, CHANGE TO WIN,)	
)	
Petitioner.)	

EMPLOYER DURHAM SCHOOL SERVICES, L.P.'S
BRIEF IN SUPPORT OF EXCEPTIONS TO
THE HEARING OFFICER'S OFFICIAL REPORT ON OBJECTIONS

McMAHON BERGER, P.C.

Geoffrey M. Gilbert, Jr.
Dean Kpere-Daibo
2730 North Ballas Road, Suite 200
St. Louis, Missouri 63131
(314) 567-7350
(314) 567-5968 (facsimile)

Attorneys for Employer
Durham School Services, L.P.

OF COUNSEL:

McMahon Berger, P.C.
2730 North Ballas Road, Suite 200
St. Louis, Missouri 63131

TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND	1
II. THE EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON OBJECTIONS	2
III. STATEMENT OF FACTS	3
A. Employer's Hayward Operation	3
B. Lead Dispatcher Michelle Dorton.....	4
C. Dorton's Supervisory Responsibilities	6
D. Dorton Assisted In Scheduling And Communicating The Union Meetings To The Eligible Voters And Solicited Union Authorization Cards	12
E. During The Eligible Voters' First Meeting With The Union, Dorton Threatened The Eligible Voters In Order To Obtain Their Signatures On Union Authorization Cards	13
F. The Union Failed To Reject And/Or Repudiate An Employee's Injection Of Race Into The Employer's Reasoning For Challenging The Ballots Of Dorton And Corley	14
G. The Union Fabricated Evidence And Refused To Produce Subpoenaed Evidence During The Objections Hearing	15
1. Bender's Summary of Notes Were Fabricated.....	15
2. The Union Failed And/Or Refused to Appropriately Produce The Signed Receipt From Applebee's	17
3. The Union Refused To Produce A Legible Copy Of Alvelais' Notes	18
4. The Union Failed To Produce Alvelais To Testify	19
IV. LEGAL ARGUMENT	19
A. Dorton's Supervisory Status.	19
1. The Hearing Officer Erred In Failing To Determine Whether Dorton Is A Supervisor Of The Drivers Under Section 2(11).....	19
2. The Hearing Officer Erred In Determining Dorton Is Not a 2(11) Supervisor	20
3. The HO Erred In Determining That Moncado's Credible Testimony Was Not Sufficient To Establish That Dorton Is A Section 2(11) Supervisor With Respect To The Dispatch Employees.....	28
B. The HO Erred By Finding Dorton's Conduct Was Not Objectionable Supervisory Taint 29	
1. Statement Of The Law	29
2. Application Of The Law To The Competent Record Evidence Clearly Establishes The HO Erred By Not Finding Dorton's Conduct To Be Objectionable Supervisory Taint	31

C. The HO Erred By Not Finding That The Union Either Told Eligible Voters That The Employer Illegally Challenged Dorton And Corley's Vote Because Of Their Race Or That The Union Failed To Repudiate An Employee's Statement That The Employer Illegally Challenged Dorton And Corley's Vote Because Of Their Race.	39
D. The Imposition Of The New NLRB Rules And Regulations Violate The Employer's Rights And Prejudiced The Employer.	41
V. CONCLUSION	43

TABLE OF AUTHORITIES

Cases

Arlington Masonry Supply, Inc., 339 NLRB 817 (2003)	21, 22
Assoc. Builders and Contractors of Texas, Inc. v. NLRB, 1:15-cv-00026 (W.D.Tex.2015)	42
Baker DC, LLC v. NLRB, 1:15-cv-00571 (D.D.C.2015).....	42
Chamber of Commerce of the United States v. NLRB, 1:15-cv-00009 (D. D.C.2015)	41
Dean & Deluca New York, Inc., 338 NLRB 1046 (2003)	22
El Rancho Market, 235 NLRB 468 (1978)	29
Glen's Market, 344 NLRB No. 25 (2005)	20
Harborside Healthcare, Inc., 343 NLRB 906 (2004)	passim
Juniata Packing Co., 182 NLRB 934 (1970), <i>enfd. in relevant part</i> 464 F.2d 153 (3d Cir.1972);	29
Millard Refrigerated Services, Inc., 345 NLTB 1143 (2005)	20
NLRB v. Kentucky River Community Care, 532 U.S. 706, 713 (2001)	22
Orlando Paper Co., 197 NLRB 380 (1972)	30
Waldinger Corp., 331 NLRB No. 544, 545-56 (2000)	29
Westwood Health Care Center, 330 NLRB 935 (2000)	22
WKRG-TV, Inc., 197 NLRB 174 (1971); <i>enfd.</i> 470 F.2d 1302 (5 Cir.1973)	30

Statutes

29 U.S.C. § 152(11)	21
---------------------------	----

Rules

Section 102.69(c)(1)(iii) of the National Labor Relations Board Rules and Regulations	1
Section 2(11)	19, 20, 21, 22

**EMPLOYER DURHAM SCHOOL SERVICES, L.P.'S
BRIEF IN SUPPORT OF EXCEPTIONS TO
THE HEARING OFFICER'S OFFICIAL REPORT ON OBJECTIONS**

Comes now, Durham School Services L.P., ("Durham" or "Employer" or "Company"), by and through its undersigned counsel, pursuant to Section 102.69(c)(1)(iii) of the National Labor Relations Board Rules and Regulations, and herewith submits its Exceptions to the Hearing Officer's Official Report on Objections ("HOR") in its entirety. For these reasons the Regional Director should reject the HOR and sustain the Employer's Objections.

I. PROCEDURAL BACKGROUND

On April 14, 2015, the Petitioner, Teamsters Union Local 853 ("Union"), filed a Petition seeking to become the collective bargaining representative of all full-time and regular part-time routers, payroll department employees, office administrators, and dispatchers employed by the Employer at its Hayward, California facility. On May 8, 2015, the Board conducted the election and at the conclusion of the election, the Board determined that 4 votes were cast for the petitioning labor organization and 2 votes were cast against the petitioning labor organization. There was one (1) challenged ballot. The Employer filed four (4) objections to the election results on May 15, 2015, and on May 19, 2015, the Regional Director for Region 32 issued an Order directing the parties to participate in a hearing for the purpose of taking evidence concerning the Employer's objections to the election. Beginning June 2, 2015, the Employer and the Union participated in a hearing before Hearing Officer Jennifer Kaufman ("HO") of Region 32 of the National Labor Relations Board in Oakland, California.

The Employer asserted four (4) objections to the May 8, 2015 secret ballot election: (1) the requisite laboratory conditions for a fair election were not present for the May 8th secret ballot election because the pro-union conduct of Supervisor, Michelle Dorton ("Dorton") reasonably interfered with the eligible voters freedom of choice in the election; (2) the pro-union

conduct of Dorton reasonably tended to interfere with the eligible voters' freedom of choice whether to sign or not to sign a union authorization card; (3) through agents and representatives, the Union coerced and threatened employees with being associated with unlawful activity by the exercise of a possible ballot challenge by the Employer, even though the exercise of such right is both lawful and protected; and (4) through its agents and representatives, coerced and intimidated employees into voting yes by advising employees that the Employer's lawful challenge was going to prevent pro-union employees from having the opportunity to exercise their right to vote.

On July 13, 2015, the HO issued her official HOR incorrectly dismissing the Employer's objections. In the HOR, the HO incorrectly found, among other things, that Dorton did not have supervisory authority over any employees in the designated voting unit. Additionally, the HO incorrectly found that Dorton's coercive solicitation of union cards through the statement, "If you want your job, you better sign this card," did not reasonably tend to interfere with the employees' choice whether to sign an authorization card or vote in favor of the Union. As a result, the HO incorrectly dismissed Employer's Objections 1 and 2. Lastly, the HO incorrectly dismissed Employer's Objections 3 and 4 because the HO incorrectly found that race or racist motivations were not interjected into the election regarding the Employer's ballot challenges of Dorton and Darlene Corely ("Corely").

II. THE EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S OFFICIAL REPORT ON OBJECTIONS

The Employer takes exception to the HOR in its entirety. The HO erred in dismissing the Employer's Objections in their entirety. At hearing, the Employer established that Lead Dispatcher, Dorton is a 2(11) statutory supervisor and that she exercises supervisory authority over employees in the voting unit including, Adela Garcia ("Garcia"). Additionally, the

Employer established Dorton's coercive and threatening statement to bargaining unit employees to obtain signatures on union authorization cards is supervisory taint. The Employer also established the Union's failure to repudiate the interjection of race or racist motivations for the Employer's ballot challenges of Dorton and Corley is objectionable conduct. Lastly, the HO erred by failing to take adverse inferences against the Union and the Union's witnesses after the Union refused to produce subpoenaed documentation and refused to produce subpoenaed witnesses – effectively precluding the Employer from securing relevant testimony. As a result, the Regional Director should reject the HO's Report on Employer's Objections in its entirety and sustain the Employer's Objections.

III. STATEMENT OF FACTS

A. Employer's Hayward Operation

At its Hayward, California operation, the Employer, a school bus company, transports children who have special needs, including some who use wheelchairs and other assistive devices, to and from school (TR 17). At the Hayward location, the Employer has a contract with the school districts in Fremont, San Leandro, San Lorenzo, Newark and Hayward, California, to provide these specialized services (TR 17). The Employer has approximately 105 drivers who serve approximately 150 routes at this location (TR 18). The drivers are represented by the Union (TR 18).

In the mornings, the drivers travel to the children's homes to pick them up and then deliver them to the school, typically between 6:30 a.m. and 9:30 a.m. (TR 19). In the afternoon, the drivers pick up the children at the schools and then deliver them to their homes, typically between 12:00 p.m. and 4:00 p.m. (TR 19). There are also mid-day routes that typically begin between 10:00 a.m. and 12:00 p.m. (TR 19).

Ronald Mahler ("Mahler") is the current General Manager of the Employer's Hayward Customer Service Center (TR 377). He has worked in school bus transportation for 46 years and has been in his current position for three (3) years (TR 377). Mahler is the highest ranking management official at the facility, with Sandra Wilson ("Wilson"), Operations Supervisor, Eileen Noonan ("Noonan"), Safety Supervisor, Jeremy Escobar ("Escobar"), Fleet Maintenance Supervisor and Roxanne Liette ("Liette"), Livermore Site Supervisor, reporting directly to him (TR 378).¹ Directly below these individuals is Dorton, Lead Dispatcher (TR 379). Below Dorton are the other office staff, such as the administrator, dispatcher and routers, and below them are the drivers (TR 384).

B. Lead Dispatcher Michelle Dorton

Dorton has been in the bus industry for 22 years and a dispatcher at the Hayward Service Center for 17 years (TR 23; 24). Dorton's nametag states she is the "Lead Dispatcher" (TR 20).² Dorton typically works from 10:30 a.m. to 7:00 p.m. (TR 22). Additionally, working in the dispatch office at the Hayward facility is Garcia who is a dispatcher (TR 16).

In general, dispatchers are responsible for coordinating activities between the drivers and to supervise the drivers by making sure they leave the bus yard on time, they pick up the children timely and deliver them to the school safely, and they deliver the children home in the afternoon safely and on time (TR 418). Dispatchers also are responsible for ensuring all routes are covered in the event a driver calls off (TR 418). They must consider various factors in covering routes, such as the computer program Versatrans, the route sheets, and their personal knowledge of the

¹ The Hayward and Livermore facilities fall under the same contract to provide bus services for the same school districts (TR 378). Livermore is considered a satellite location of the Hayward operation.

² Paula Moncado ("Moncado"), driver, noted that Dorton has a name badge hanging on her monitor that reads "Michelle Dorton, Lead Dispatcher" (TR 294). Mahler confirmed he too has seen Dorton's name badge that states she is the Lead Dispatcher (TR 383).

drivers, the routes and children being transported (TR 419). In the event of a vehicle breakdown, the dispatcher is responsible for making sure the children are safe and then transported to the school or their home as safely by getting another bus out to the location as quickly as possible (TR 419, 420).

As the Lead Dispatcher, Dorton has a heightened level of responsibility as she must know all of the routes and the condition of the child being transported to make sure the drivers have the proper equipment and vehicle to match the needs of the route (TR 418). Covering routes also is a necessary and important part of her responsibilities because the Employer frequently is short at least one driver (TR 23). To address such a shortage, Dorton can refer to "Versatrans," a program containing all of the various route details, which allows her to identify other drivers' routes to determine whether there is a sufficient enough gap in their route to fill in for the absent driver (TR 23). Another option available to Dorton to fill the route is to call out over the radio to ask for volunteers to take the route (TR 23-24). However, primarily Dorton will rely on her memory of which drivers are on which route to determine if drivers are available to assist with the route (TR 26). In such a situation, Dorton could contact the driver and determine if he/she was available to help on a particular route or a particular pick up (TR 27). If the Employer fails to cover a route, it is subject to fines referred to as liquated damages to be paid to the school district (TR 235).

In performing her job duties, Dorton uses the Employer's "fleet board," which contains specific information concerning the routes, busses, and drivers in service on a particular day (TR 104-05). Dorton moves busses around the fleet board during the day in the event a driver calls off and she has to cover the driver's route (TR 106).

C. Dorton's Supervisory Responsibilities

One of Dorton's numerous supervisory responsibilities is to approve employee requests for time off. If a driver calls off, then it is Dorton's responsibility to make sure their route is covered (TR 55). If a driver requests time off through completion of a time off slip, the driver can deliver the slip to Dorton, the Operations Supervisor or the General Manager (TR 57-58). Although Dorton testified at hearing that when a driver presents her with a time off slip, she gives it to the Operations Supervisor, when asked to provide such slips in response to the Union's subpoena for such information, Dorton produced a banker's box full of time slips that she had retained in her possession (TR 62).

Further, the Employer introduced direct evidence of Dorton approving an employee's request for time off through Employer Exhibit 22 (TR 406; EX 22). As shown by this note, the employee, Maria Lopez, a Union representative, requested to take off work on April 6, 2015, and Dorton signed the note at the bottom with her signature (EX 22). Dorton explained that the normal request for time off slip form was not used in this particular situation because the Employer had run out of such slips and had ordered more, but they had not yet been delivered (TR 735).³

With respect to the time off slips entered into evidence at hearing as Employer Exhibit 4, each of them included Dorton's signature (TR 72; EX 4). Dorton confirmed that she was in charge of the time off slips identified in Employer Exhibit 4 (TR 73). The General Manager at the time of the time slips in Employer Exhibit 4 granted her the authority to grant time off as

³ Although Dorton tried to explain away her signature on the note, her explanation is not credible as established on cross-examination. Specifically, Dorton could not articulate a credible justification for her position that her signature on the note was not an approval of the employee's request for leave. Rather, she maintained, incredibly, that she merely was indicating that she had received the document, even though she did not routinely do so for other employee requests for time off. Clearly, Dorton approved this employee's request for time off, as she has done repeatedly during her tenure as the Lead Dispatcher.

indicated by her signature on the slips themselves (TR 73). Furthermore, it is important to note with respect to the slips identified in Employer Exhibit 4, Mahler discovered these on his own initiative after Dorton had not identified them in response to his request for all of the call off slips (TR 405). Rather, Dorton only directed Mahler to a box underneath the counter containing what turned out to be only some of the slips in her possession (TR 405). Later that evening Mahler returned to Dorton's work area and discovered the additional request for time off slips that Dorton had not previously produced or identified (TR 411; EX 4). Notably, the slips Mahler discovered on his own that evening were different than the slips produced by Dorton in that the newly discovered slips had Dorton's signature on the approval line (TR 411-12; EX 4).

Dorton admitted at hearing that if she approved a request for time off, the employee would not be assessed an attendance point under the Employer's attendance policy (TR 123). Dorton would have considered the reason for the requested time off, the number of other drivers that were out at the time, and the type of route involved in making her decision to approve the time off (TR 124). In addition, if the driver calling off drove a wheelchair bus, then Dorton would need to consider this factor in determining who could replace the driver (TR 124).

On occasion, Dorton has had to fill a driver's route based on the information contained on the time off slip received from the driver prior to the point in time when the request for time off actually had been approved (TR 76). Also, Dorton would have to cover a driver's mid-day route without Wilson's signature or verbal permission on the request for time off slip so long as that driver was performing another mid-day route (TR 94). In 2015, in fact, Dorton has had to cover a driver's shift without a signed request for time off slip (TR 90-91).⁴

⁴ Dorton's confirmation of this fact contradicted her earlier hearing testimony wherein she claimed she never covered a driver's shift unless she had assigned copy of a request for time off slip (TR 91).

Pursuant to the Employer's attendance policy, if an employee asks for time off in advance, it will not be recorded as an occurrence on their record, but if an employee calls off work the day of the absence, or takes off work even though his/her request was denied, then it will be counted as an occurrence (TR 143; EX 13).⁵ Dorton maintains a daily list of employees who take off without permission (TR 95). She then reports this information to Wilson (TR 98). Wilson relies on the dispatchers to determine who has called off on a particular day (TR 145). In fact, Wilson has disciplined drivers based on such information (EX 23; TR 238-39).

It is without dispute that only Dorton, Wilson, and Mahler, are authorized to accept requests for time off slips from drivers (TR 156). Further, only Dorton, along with Mahler and Wilson, are authorized to grant time off to drivers who make such requests (TR 145-46). Shirley Myers ("Myers"), Administrator for the Hayward facility and eligible voter in the instant proceedings, also confirmed that Dorton has the authority to grant employees time off (TR 586).

Wilson has a specific procedure she follows when approving or denying a request for time off, which includes making certain notations on the request itself (TR 259; EX 25 and 26). Wilson does not verbally approve requests for time off, but does so in writing by signing the request for time off slip (TR 146). The Employer presented a significant number of examples at hearing of requests that were approved or denied that did not contain Wilson's specific notations, establishing someone other than Wilson approved or denied the request. For example, Wilson did not sign EX 5 and, thus, did not approve that particular request for time off, even though the employee did not work the p.m. route and the employee's request for time off was granted (TR 147-48). Similarly, EX 6 is not signed by Wilson and she did not approve this request for time off, even though the employee's request was granted (TR 151). Another example is EX 14,

⁵ Pursuant to the attendance policy, after a third occurrence, the employee receives a verbal coaching; after the sixth occurrence, the employee receives a written warning; after the ninth occurrence, the employee is subject to termination (TR 236).

where Wilson did not approve the request for time off, but the employee did not work the shift in question and was not assessed a point under the attendance policy, meaning the employee received approval for the absence (TR 156). *See also*, EX 15 (employee Pagan); EX 16 (employee Samnang); EX 17 (employee Perez); EX 18 (employee Jackson); EX 19 (employee Washington); EX 20 (employee Davis); EX 21 (employees Ruiz, Jones, and numerous others included within EX 21), which establish these employees were authorized to be absent.

Wilson did not sign any of these requests, she did not see these requests, and no attendance points were assessed for the missed time, but they were approved for time off from work during the shift worked by Dorton (TR 160; 234; 235). Each of these employees were approved to take off time from either their mid-day or p.m. routes, and the shift was covered by Dorton as the lead dispatcher. Wilson never told Dorton she did not have authority to approve time requests (TR 160). Mahler confirmed the foregoing practice was an accurate description of determining whether an employee would have received approval for a time off request (TR 389). Mahler also confirmed that he would not have approved any of the requests for time off presented as examples at hearing that did not have his signature (TR 390).

Had the employees referenced in the Exhibits introduced at hearing not been given approval to take the time off as requested, then an attendance point would have been assessed to the employee's attendance record (TR 230). As shown in the Exhibits, however, no attendance points were assessed, meaning the requests for time off were approved. Moreover, driver Penny Reynolds ("Reynolds") confirmed at hearing that there were times where her request for time off was approved without a written signature, meaning Dorton approved it (TR 523). Further, when needing to take time off, Moncado, driver, testified that she requests a time off slip from Dorton, completes the slip, and then returns it to Dorton (TR 294; 295).

Mahler confirmed that only he, Wilson, and Dorton are authorized to receive request for time off slips from drivers and, accordingly, these are the only three individuals authorized to approve requests for time off (TR 388). If Mahler were to receive the request for time off, he would ask Dorton if she could cover the route in the driver's absence, and if she could, then he would approve the request (TR 388-89). Just as Wilson, Mahler does not verbally approve requests for time off (TR 389).

Further evidence of Dorton's supervisory authority to grant time off is demonstrated by the following incidents. On one occasion, a driver (Stephanie Ibanez) got into an accident on her way home after work and the next morning, Mahler asked to speak with the driver to obtain her version of the events surrounding her accident (TR 412). Wilson informed Mahler that the driver was not there that day because Dorton had given her that day and the next day off (TR 412-13). On another occasion, Ina Lynn Door ("Door"), a driver, received approval from Dorton to take time off for surgery she needed to have (TR 558).

As for the assignment of work by Dorton as the Lead Dispatcher, if a driver delivers a child to his/her home and a parent or other responsible party is not there to receive the child, then the driver is instructed to contact Dorton for further instruction (TR 118). Dorton will work with the school district to determine the best course of action to take with respect to what to do with the child until the adult is located (TR 118). Examples of decisions made by Dorton in this situation include sending another bus out to pick up the child or having the driver bring the child back to the bus yard (TR 120).

Wilson rarely becomes involved in the process of covering routes; that responsibility falls solely on Dorton's shoulders (TR 250). Wilson has heard Dorton inform a driver (Mark Hobson)

that he had to cover a route due to another driver (Donna Jackson) having a conflict (TR 250). As a result, Mr. Hobson covered the route (TR 250).

Moncado is a driver who was placed on light duty in the dispatch office for approximately four months in 2015 as a result of an injury (TR 290-91). At the beginning of the assignment, Wilson instructed Moncado that she was to take her orders from Dorton and to get approval from Dorton if she had to leave early (TR 301). Moncado asked Dorton what needed to be done while she worked in the dispatch office (TR 298). Dorton provided Moncado with her work assignments while she worked in the dispatch office, such as giving her a route sheet with parents' contact information that Moncado was required to call, having her answer the phones, calling out information on the radio, obtaining documents from the printer, and other various assignments (TR 299).

Moncado believed Dorton was her supervisor during the time she worked in the dispatch office (TR 300). Moncado based her belief in this regard on all of the directions she had given her and that she could not refuse Dorton's directions (TR 311). Eligible voter Myers confirmed that Dorton directs the work of others, including Garcia, another dispatcher, by, among other things, telling her to make sure the buses are in the yard, directing her to contact the parents when necessary, and ordering her to make sure the binder is properly completed (TR 590-91).

Further, Dorton counsels other employees in dispatch on their job performance, such as proper phone technique or communications with drivers (TR 252). In handling complaints from angry or upset parents about a transportation issue, Dorton rarely consults with Wilson about such conversations, while the other dispatcher, Garcia, does consult with Wilson (TR 253).

Dorton is authorized to give verbal counseling to drivers (TR 414). On more than one occasion, Dorton has questioned a driver about their decision to pick up a second child in a

reverse order which resulted in the bus being late (TR 414). Dorton also has questioned drivers about them forgetting a child (TR 414). Each of these behaviors can result in liquidated damages being assessed against the Employer (TR 414).

Further evidence of Dorton's supervisory status with respect to counseling and correcting inappropriate behavior is shown through an event that occurred in April 2015 involving Moncado and another employee named Sharon (TR 300). Specifically, during a brief down period when the activity in the dispatch office was relatively slow, Moncado and Sharon were discussing various topics among themselves when Dorton stated, in a loud voice, "Excuse me, are you two still on the clock?" (TR 300). When they stated they were, Dorton stated, "Then I expect you should be working" (TR 301). After being admonished by Dorton, her supervisor, Moncado returned to work (TR 301).

Dorton also criticized Moncado's work performance while she was in dispatch, telling her she needed to figure out an issue on her own; in essence, Moncado believed she was receiving a verbal counseling (TR 302). On another occasion, Dorton's attitude toward Moncado was so inappropriate that she filed a grievance with her Union, during which she told her Union representative that Dorton was the head dispatcher (TR 304; 310). An incident report was prepared on this issue (TR 400-01; EX 31).

D. Dorton Assisted In Scheduling And Communicating The Union Meetings To The Eligible Voters And Solicited Union Authorization Cards.

Prior to the Friday, May 8, 2015 secret ballot election, Dorton was the primary contact with Union Organizer, Rodney Smith ("Smith"), in the Union's attempt to organize the eligible voters (EX 2). As Employer Exhibit 2 clearly indicates, Dorton communicated with Smith directly regarding the filing of the Petition as well as the setting up of Union meetings with the eligible voters. In fact, testimony presented at hearing established that Dorton set up and

ultimately communicated to the eligible voters when the eligible voters were going to have a meeting (TR 581; 620).

Myers specifically testified that she was made aware of the Union meeting by Dorton when Dorton pulled her aside and informed her that the members of the administrative staff were joining the Union and were going to have a meeting (TR 581). Dorton proceeded by instructing Myers that the Union meeting was very important and that they all needed to attend (TR 581). At hearing, Candace Comandao ("Comandao") also testified that she was informed by Dorton of when the Union meeting would take place (TR 620). Comandao further testified that Dorton called her on the phone and informed her of the meeting, the time, and the location (TR 620). Finally, Comandao testified that Dorton told her to attend the union meeting (TR 620).

Dorton assisted the Union by attempting to secure authorization cards signed by eligible voters on behalf of the Union. (TR 41). She specifically testified and admitted that Union authorization cards were delivered to her and that she approached other eligible voters and asked them if they wanted the authorization cards. (TR 41-42). Dorton also testified that after she distributed union authorization cards to eligible employees and the employees brought the authorization cards back to her. (TR 43). After the cards were returned to Dorton, she delivered them to an undisclosed driver, whom she refused to identify during the hearing. (TR 43). In fact, Myers specifically testified that Dorton approached and offered her a union authorization card; however, Myers testified that she never took an authorization card from Dorton. (TR 583).

E. During The Eligible Voters' First Meeting With The Union, Dorton Threatened The Eligible Voters In Order To Obtain Their Signatures On Union Authorization Cards.

In April of 2015, the eligible voters, including Dorton, attended a meeting with the Union at a restaurant named TOGO's in Hayward, California (TR: 583). Present during this meeting with the Union was Garcia, Router Sherry Head ("Head"), Comandao, Corley, Myers, and

Dorton (TR 596). During this meeting, Union authorization cards were passed out for the employees to sign. In order to obtain the signatures of all the employees, including the signature of her subordinate, Garcia, Dorton stated to the entire group of employees, “If you want your job, you better sign this card” (TR 610). At hearing, Myers expressly testified that Dorton made this statement during the meeting with the Union in order to get all eligible employees to sign a union authorization card (TR 600; 610). Additionally, Myers specifically testified the statement was a threat and that it was made to the entire group of eligible employees who attended the Union meeting at TOGO’s (TR 600; 610)⁶.

F. The Union Failed To Reject And/Or Repudiate An Employee’s Injection Of Race Into The Employer’s Reasoning For Challenging The Ballots Of Dorton And Corley.

The night before the secret ballot election, on May 7, 2015, several of the eligible employees were informed by the Union that the Employer had challenged the voting eligibility of Dorton and Corley (TR 339-342; 616). During a telephone conversation with Smith, someone indicated that the Employer was challenging Dorton and Corley’s vote because of their race (TR 340-343). At hearing, Smith did not deny that race was discussed. Instead, Smith testified during hearing that when such statements are made he merely brushes those types of things off (TR 342). Thus, instead of rejecting or repudiating such statements, Smith merely brushed this statement off.

Subsequently, Comandao was in the dispatch room when she overheard a phone call with Dorton and Head where they informed Comandao that the Employer was challenging the votes of Dorton and Corley (TR 616). During this conversation, the employees became very upset

⁶ In the HOR, the HO improperly concluded that Dorton’s statement was not threatening, despite Myer’s direct testimony stating that she took the statement as a threat. (TR 600; 610). The HO’s decision to completely ignore direct testimony from Myers regarding this issue was improper and directly led to the incorrect decision that Dorton’s statement did not reasonably tend to interfere with the employees’ freedom of choice whether to sign an authorization card or vote in favor of the Union. (See HO’s Report).

because they could not understand why the Company could essentially not “allow” someone to vote (TR 618). In fact, Comandao became so upset by the Employer challenging the votes of Dorton and Corley that she changed her vote from a no to a yes (TR 616).

G. The Union Fabricated Evidence And Refused To Produce Subpoenaed Evidence During The Objections Hearing.

1. Bender’s Summary of Notes Were Fabricated.

At hearing, the Employer introduced a summary of a union meeting drafted by Steve Bender (“Bender”), Union organizer, into evidence (EX-27). The competent record evidence irrefutably establishes that Bender’s summary is a fabricated document created after the fact and solely to provide the Union with a defense to the Employer’s objection regarding challenged ballots.

In support of position in this respect, the Employer asserts at hearing both Bender and Smith testified that the first time they learned that the Employer intended to challenge the votes of Corley and Dorton was when the Union received the voter eligibility list from the Employer on April 22, 2015 (TR 353, 468-469). The summary, however, is dated April 21, 2015 – one day prior to the date the Employer sent the voter eligibility list to the Union. As such, it would have been impossible for the Employer’s intention to challenge Corley and Dorton’s votes to have been raised at a meeting on April 21, 2015 and the only logical explanation for the summary is that it was created out of whole cloth by the Union to assist in the Union’s defense of the Employer’s objections.

At hearing, Bender attempted to address the problem created by the fact that the summary referencing a discussion of the Employer challenging Dorton’s ballot is dated prior to the time the Employer indicated it intended to challenge Dorton’s ballot by testifying that his notes were incorrectly dated (TR 461, 463-465, 492-493). According to Bender, the Union meeting

referenced in the summary took place on April 30, 2015 and the summary should have reflected that date. This explanation by Bender, however, even if true, does not establish that EX-27 is anything more than a fabricated document. In this respect, even if the summary pertains to a meeting conducted on April 30, 2015, the following irrefutably proves that the summary was fabricated:

- Bender testified that he rewrites his initial notes to ensure accuracy, correct spelling errors and correct grammatical errors (TR 461, 463-465, 492-493). Bender also testified that prior to producing EX-27 in response to the Employer's subpoena he noticed that the date on the document was incorrect (TR 476-478). Despite Bender's practice of rewriting his notes to ensure accuracy, Bender submitted his summary with an incorrect date (TR 478). In addition, the summary is replete with misspelled words and grammatical errors (EX-27; TR 463-464).
- Smith testified that after Union meetings, he debriefs with Bender (TR 330). Smith also testified that he called Dorton and other eligible voters 2 or 3 days before the election to tell Dorton her vote was going to be challenged (TR 336-342, 352-353). If the issue of the challenged ballots had been brought up during the April 30, 2015 meeting as Bender claimed, Bender would have told Smith about his conversation with the eligible voters regarding the challenged ballots and Smith would have had no reason to call Dorton and discuss the issue.
- Dorton, Myers and Candy all testified that the Employer's intention to challenge Dorton and Corley's votes was never discussed at the Union meeting conducted by Bender (TR 586-587, 615-616, 749-754).
- If the issue of challenged ballots had been raised by the eligible voters at the April 30, 2015 Union meeting as Bender claims, it defies common sense to believe that the eligible voters would have only discussed Dorton and not Corley. Bender's summary, however, only refers to Dorton (EX-27; TR 503, 506).
- Dorton, Myers and Corley all testified the first time they learned that the Employer intended to challenge Dorton and Corley's votes was either the night before or the morning of the election (TR 586-587, 615-616, 749-754).
- Bender testified that he rewrites his notes into a summary to ensure accuracy and that during the April 30, 2015 meeting he explained the entire challenge process to the eligible voters (TR 471-474). Bender's summary, however, does not reflect

any discussion of his lengthy explanation of the challenge process as described at hearing (EX-27).

- Portions of the summary are drafted in the wrong tense (TR 461-463).

In the HOR, while the HO acknowledged that Bender's testimony was not credible and that his re-written notes with a date discrepancy were not credible, the HO failed to come to the one inescapable conclusion that the summary presented at hearing by Mr. Bender and the Union was fabricated evidence designed to give the Union a defense to the fact that the Union adopted the position that the Employer was engaging in illegal conduct by challenging ballots based on race. (See HOR). As a result of the HO's failure to properly determine that Bender's notes were fabricated, she improperly failed and/or refused to impose the warranted sanctions of an adverse inference against the Union.

2. The Union Failed And/Or Refused to Appropriately Produce The Signed Receipt From Applebee's.

During hearing, Bender testified the meeting he conducted with the eligible voters took place on April 30, 2015 at Applebee's. In support of his position, Bender submitted an unsigned receipt for a meal at Applebee's dated April 30, 2015. Bender, however, also admitted submitting a signed receipt to the Union regarding dinner at Applebee's and said receipt was requested by the Employer and HO on several occasions. Despite admitting that a signed receipt exists, the Employer's numerous requests for the signed receipt and the HO's numerous requests for the production of the receipt, the Union failed to produce the signed receipt.

However, despite the Unions refusal to produce the receipt pursuant to the Employer's subpoena and the HO's direct demands during the hearing, the HO failed and/or refused to appropriately draw an adverse inference sanction against the Union relating to its refusal to

produce the signed receipt. In fact, despite the Employer's request for the HO to draw such adverse inference, the HO failed and/or refused to even address the issue in the HOR.

3. The Union Refused To Produce A Legible Copy Of Alvelais' Notes.

In response to the Employer's Subpoena, the Union produced an illegible copy of Stacey Alvelais' ("Alvelais") notes referencing Dorton's conduct at work. These illegible notes were admitted into evidence as EX 35. During the hearing, both Counsel for the Employer and the HO made numerous requests for the Union to produce a legible copy of Alvelais' notes. Counsel for the Employer even agreed to accept a picture of the legible notes sent via a smartphone. Initially, the Union claimed that a legible copy of the notes had been misplaced in Alvelais' office. On the fourth day of hearing, Counsel for the Union stated that a legible copy of the notes still had not been located but that she was willing to make an offer of proof as to the contents of the notes. Upon realizing the absurdity of her position, Counsel took the position that a legible copy of the notes had been located at Alvelais' house but that the Union still did not have a copy to produce. At the time the hearing concluded for the week on Friday, June 5, 2015 the Union still had not produced a legible copy of the notes. The hearing was scheduled to reconvene on Tuesday, June 9, 2015. At the time the hearing reconvened the Union, despite having three days to secure a copy or even a picture of the legible notes, still refused to produce a legible copy of the notes.

Again, despite the Employer's subpoena requesting said document, numerous demands by the HO to produce said document and the Union's continued refusal to produce the document, the HO erroneously did not draw an adverse inference against the Union relating to the document and its relevance to Dorton's 2(11) supervisory status with respect to the dispatch employee, including Garcia.

4. **The Union Failed To Produce Alvelais To Testify.**

In addition to failing to produce a legible copy of Alvelais' notes, the Union refused to comply with the Employer's properly served Subpoena Ad Testificandum to Alvelais. In this respect, the Union initially stated that Alvelais was out of town on business. As the hearing progressed, the Union stated that Alvelais would not be available to testify until Tuesday, June 9, 2015. Ultimately, the hearing was continued until June 9, 2015 but despite the Union's prior representation that Alvelais would be available to testify on said date, the Union refused to produce Alvelais.

Despite the Employer properly serving a Subpoena Ad Testificandum to Alvelais and the Union's continued refusal to produce Alvelais to testify regarding Dorton's 2(11) supervisory status, the HO improperly refused to draw an adverse inference against the Union relating to Alvelais' testimony. In fact, despite the Employer's requests for the HO to draw such an adverse inference, the HO failed and/or refused to even address the issue in the HOR.

IV. **LEGAL ARGUMENT**

A. **Dorton's Supervisory Status.**

1. **The Hearing Officer Erred In Failing To Determine Whether Dorton Is A Supervisor Of The Drivers Under Section 2(11) Of The Act.**

In the HOR, the HO expressly refused to determine whether Dorton is a statutory supervisor over the Employer's drivers. Specifically, the HO stated:

I find it unnecessary to resolve Dorton's supervisory status with respect to the drivers in order to dispose of the objections in this case; however, because even viewing the evidence of supervisory status in the light most favorable to the Employer, and concluding that Dorton meets the statutory definition of supervisor, there is insufficient evidence to conclude that Dorton's conduct reasonably interfered with employees' free choice in the election. In reaching this conclusion, I rely on the lack of record evidence to demonstrate that Dorton exercises supervisory authority over any of the eligible voters (HOR p. 7).

Such a conclusion was in clear error as the determination of whether Dorton is a 2(11) supervisor over the drivers is relevant and necessary to the HO's determination of whether objectionable supervisory taint under Harborside Healthcare, Inc., 343 NLRB 906 (2004). As will be more fully detailed below, under Harborside, the supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not. Id. In addition, the Board has ruled that the decisions in Harborside and Glen's Market do not stand for the proposition that coercive supervisory conduct towards an employee who is not the supervisor's direct subordinate cannot be objectionable. Millard Refrigerated Services, Inc., 345 NLTB 1143 (2005). Thus, contrary to the HO's conclusion that the only relevant finding regarding Dorton's supervisory status is whether Dorton was a supervisor over the eligible voters, determining whether Dorton was a supervisor over the drivers is extremely relevant and the HO was obligated to issue a finding in this respect.

Accordingly, the Regional Director should determine that the HO's refusal to issue a finding as to whether Dorton is a supervisor under Section 2(11) of the Act with respect to the drivers was in error and the Regional Director should order that such a finding be made.⁷ Additionally, the Regional Director should require that applicable binding precedent be applied to said finding inasmuch as the Employer maintains that in light of the HO's other findings, application of controlling precedent to a finding that Dorton is a supervisor under Section 2(11) of the Act compels that the election be set aside a new election scheduled.

2. The Hearing Officer Erred In Determining Dorton Is Not a 2(11) Supervisor.

In the HOR, the HO found that the record evidence "tends to establish that Dorton is authorized to approve time off for drivers" (HOR p.5). In addition, in the HOR, the HO referred

⁷ Dorton's supervisory status over the drivers is relevant in determining whether Dorton engaged in objectionable supervisory taint in violation of the Board's precedent set in Harborside

to Dorton as the “Head Dispatcher” (HOR p.1) and held that Dorton was responsible for ensuring that routes get covered due to an absence or when the route needs to be covered for any other reason (HOR p.5). The HO also found that the Union met with the Employer on three occasions to complain about Dorton’s supervision of employees (HOR p.6). Finally, the HO found that Dorton was responsible for assigning work to employees in dispatch, allowing employees to leave work from dispatch and that employees in dispatch viewed Dorton as a supervisor (HOR p. 7).

Despite these findings, the HO incorrectly concluded that Dorton was not a “supervisor” as defined by section 2(11) of the Act. In reaching this finding, the HO ignored un-contradicted record testimony and failed to correctly apply controlling precedent. In addition, the HO failed to draw an adverse inference as to Dorton’s supervisory status based on the Union’s complete disregard for the NLRB and its policies and procedures. Accordingly, the Regional Director should conclude the HO’s decision with respect to Dorton’s supervisory status was in error.

a. Definition Of Supervisor.

Section 2(11) of the Act defines “supervisor” as:

an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the forgoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). The possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status, as long as the authority is carried out in the interest of the employer and requires the exercise of independent judgment. Arlington Masonry Supply, Inc., 339 NLRB 817 (2003). “Failure to exercise authority does not negate supervisory status because possession rather than exercise of supervisory authority determines supervisory status.”

Westwood Health Care Center, 330 NLRB 935, 938 (2000). Stated slightly differently, it is the existence of the supervisory power that determines whether the individual is a supervisor under the Act, not whether the individual actually has exercised that power. Arlington Masonry Supply, Inc., 339 NLRB at 818.

Thus, applying the foregoing definition, individuals are supervisors if “(1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is ‘held in the interest of the employer.’” NLRB v. Kentucky River Community Care, 532 U.S. 706, 713 (2001). An individual’s supervisory status can be established if the putative supervisor has the authority to either perform a supervisory function or to effectively recommend a supervisory function. The burden of establishing supervisory status rests upon the party seeking to assert the status. Dean & DeLuca New York, Inc., 338 NLRB 1046, 1047 (2003).

b. The HO Ignored Competent Record Evidence In Determining That Head Dispatcher Dorton Is Not A Section 2(11) Supervisor

In the HOR, the HO ignored the following un-contradicted facts regarding Dorton’s ability to grant time off⁸ in finding that Dorton is not a supervisor under Section 2 (11) of the Act:

1. Dorton has supervisory authority to, and actually does, approve employee requests for time off. She is one of only three managers/supervisors at the Hayward facility who has the authority to grant employees time off, the other two being Wilson and Mahler.

⁸ The Employer maintains that a review of the record evidence regarding Dorton’s ability to grant time off is necessary in light of the fact that the HO qualified her finding on Dorton being able to grant time off by stating the evidence “tends” to establish said fact.

2. Dorton has signed off on employee-submitted requests for time off on numerous occasions (EX 4).⁹
3. Dorton approved employee requests for time off even when the proper form were not available, such as when an employee provided her with a written note requesting time off (EX 22).
4. Witness testimony during the hearing that they went to Dorton for approval to take time off.
5. Myers, an eligible voter in the instant proceedings, confirmed that Dorton has the authority to grant employees time off (TR 586).
6. Moncado, testified that she requests a time off slip from Dorton, completes the slip, and then returns it to Dorton (TR 294; 295).
7. Dorton authorized employee Ibanez to take off two days from work after she had been involved in an accident (TR 412-13) and authorized Dorton to take off time for surgery (TR 558).
8. Dorton approved numerous other requests for time off (EX 5, 6, 14, 15, 16, 17, 18, 19, 20, and 21) as evidenced by the fact that she covered routes and did not report the individuals whose routes he covered as absent. Disciplinary action will result if an employee accumulates enough absences to reach the minimum thresholds set forth in the attendance policy.

In addition, the HO ignored the uncontradicted evidence that Dorton assigns work to dispatch employees, including Garcia, as the Head Dispatcher and that Dorton engages in other supervisory conduct regarding dispatch employees. Specifically, the HO ignored the following record evidence:

1. Dorton assigned all of the work performed by Moncado while she worked in the dispatch area.
2. Moncado's unrefuted testimony that Dorton granted her permission to leave early for the day to attend doctor's appointments (TR 298-99).
3. Moncado's unrefuted testimony that she could not refuse Dorton's instructions because Dorton was her supervisor (TR 300).

⁹ The Employer was able to admit such evidence into the record despite Dorton's effort not to reveal the existence of the slips to Mahler when he inquired of her.

4. Moncado's unrefuted testimony that Dorton gave similar assignments to other dispatchers working in the area, including Garcia. (TR 311).
5. Myers unrefuted testimony that Dorton directed the work of others, including Garcia, by directing Garcia to make sure the buses are in the yard, directing Garcia to contact the parents when necessary, directing Garcia to route bus stops, and ordering her to make sure the binder is properly completed (TR 590-91). Such directions and performance of these directed tasks to Garcia are vital to the function of the Dispatch office and to the overall operations of the Hayward Service Center. The directions to perform dispatcher tasks are such as calling parents regarding their children's safety, transportation services, or behavior are neither minor nor routine. Additionally, directing Garcia to "route the kids" as Myers testified to is also neither a routine nor minor task. The tasks described are vital to the success of the Employer's operation and can only be assigned by the Lead Dispatcher, Dorton. Accordingly, such directions by Dorton to Garcia are neither minor nor routine. (TR 590-591).
6. Employees do not question Dorton's directives because she is considered a supervisor. (TR 560).
7. Dorton is authorized to give verbal counseling (TR 414).
8. Dorton verbally reprimanded Moncado and another employee named Sharon for talking among themselves during work time (TR 300). Dorton asked them, in a loud voice, "Excuse me, are you two still on the clock?" (TR 300). When they stated they were, Dorton stated, "Then I expect you should be working" (TR 301). After being admonished by her supervisor, Moncado returned to work (TR 301).
9. Dorton criticized Moncado's work performance on another occasion while she was in dispatch, telling her she needed to figure out an issue on her own; in essence, Moncado believed she was receiving a verbal counseling (TR 302).
10. Moncado's unrefuted testimony at hearing that Dorton was her supervisor while Moncado was working in the dispatch office based on the fact that Dorton directed her in her assignments, gave her verbal demands and directives that were to be followed, and decided whether she could leave for the day to attend doctor appointments which were necessary because of her injury (TR 304).
11. Moncado's unrefuted testimony at hearing that she asked Wilson about taking off work early to attend such appointments and Wilson replied, "Clear it with [Dorton]" (TR 305). In fact, after asking Dorton about leaving early, Dorton would respond either with, "No, you need to stay," or "Yeah, I guess you could leave" (TR 305).

Finally, the HO ignored the following un-contradicted facts/testimony that are relevant to

Dorton's supervisory status:

- 1 Dorton is responsible for covering routes when a driver calls off, which requires her to locate available drivers and direct them to take over routes when practical (TR 250).
- 2 Dorton instructed driver Hobson to cover a route that another driver (Jackson) could not operate due to a conflict (TR 250).
- 3 Dorton also directs drivers to assist with situations where a child's parents are not home to receive the child, which may require the driver to stay with the child or to bring the child back to his/her school or the bus yard to await further instructions from Dorton (TR 118-20).
- 4 Moncado's unrefuted testimony regarding a conversation Dorton had on the phone with a driver during which she informed the driver he had to cover the route of another driver, stating he could not do "this" to her and could not leave her like that (TR 308).
- 5 Door's testimony at hearing that she does not question the assignments Dorton gives her (TR 560).
- 6 Dorton questioned a driver about the driver's decision to pick up a second child in a reverse order which resulted in the bus being late (TR 414). Dorton also questioned drivers about them forgetting a child (TR 414). Each of these behaviors, if not addressed, can result in liquidated damages being assessed against the Employer (TR 414).
- 7 If Dorton is not deemed a supervisor, there would be no representative of management present at the facility on a daily basis between 5:00 p.m. and 7:00 p.m. (TR 242). Varying numbers of drivers are still on the road during these evening hours and incidents occur that require the drivers to contact a member of management for guidance, which would be Dorton since the other members of management are gone by this time (TR 248). For example, the driver's bus could break down (TR 249), or a parent could call in to discuss a missed route or a child's needs for the next day, or the school district could call about a missing child (TR 416). Dorton is authorized to speak on behalf of the Employer during these communications (TR 416). Moncado confirmed that if an issue arose after 5:00 p.m., she would call Dorton (TR 313). Mahler testified that Dorton is the only management representative at the facility at that time of the evening (TR 415). In fact, Dorton has the responsibility of locking the facility at night and making sure all employees are out of the building prior to locking and leaving for the night (TR 416).

- 8 Dorton herself views her role as supervisory in nature. (TR 381; 452-53).
- 9 Dorton refers to herself as Lead Dispatcher during staff meetings and during one particular meeting Dorton stated that as the Lead Dispatcher, she should be trained on the computer and have a say on who else would be trained on the computer (TR 381; 452-53).
- 10 Dorton has approached Mahler and asked that her compensation level be increased because she supervises other employees (TR 400). Dorton had a similar conversation with Corina Nelson ("Nelson"), the Employer's Employee Relations Manager, about her compensation, claiming she should be getting paid more than Garcia because she was directing her work (TR 455).
- 11 Dorton maintains a name badge that expressly states her title is "Lead Dispatcher." (TR 20).
- 12 Other managers, supervisors and employees of the employer unquestionably regard Dorton as a lead dispatcher and supervisor. Upon her hire, Dorton was placed into the Lead Dispatcher position (TR 380-81; EX 1). Other members of the staff, including Comandao, refer to Dorton as Lead Dispatcher (TR 615). Drivers refer to Dorton as Lead Dispatcher, including Door, who referred to Dorton as the person to whom she and other drivers reported and from whom she received her work assignments (TR 557).
- 13 Union representatives view Dorton as a supervisor. Specifically, in January 2015, Mahler was involved in a meeting with Union representative Alvelais during which they discussed complaints that Dorton's supervisory skills were creating a hostile work environment among the drivers (TR 397). Specifically, Alvelais was upset with the way Dorton was assigning work to employees and showing favoritism among the employees in her work assignments (TR 398). Alvelais also complained about the tone Dorton used toward some of the employees which was causing the hostile work environment (TR 398). As a result of these concerns, Mahler removed the responsibility of handling the cover drivers from Dorton and gave it to Wilson (TR 398). In addition, Mahler agreed to get Dorton training on improving her supervisory skills (TR 398). Unfortunately, Alvelais did not believe anything changed with respect to Dorton's conduct and she raised the issue again in March/April 2015 during a meeting with Mahler, Nelson and Union representative Alvelais (TR 399). Alvelais warned Mahler that he needed to get "his supervisor," referring to Dorton, under control or the issue would be escalated and the Company possibly could be fined (TR 400; 451).

If the HO had correctly considered the above facts and applied said facts to controlling precedent, the HO would have been compelled to conclude that Dorton was a supervisor as

defined under section 2(11) of the Act with respect to both the drivers and the dispatch employees, including Garcia.

c. The HO Erred In Refusing To Draw An Adverse Inteference Relating To The Union's Refusal To Produce A Legible Copy Of Alvelais' Notes As Well As Alvelais To Testify

There is a reason that the Union was so adamant in its refusal to produce a legible copy of Avileas' notes and its refusal to produce Avileas to testify – Avileas' notes and her testimony would have been detrimental to the Union's position that Dorton was not a supervisor. Stated another way, there is no other logical explanation for the complete lack of professional courtesy and respect for the NLRB that was exhibited by Counsel for the Union other than the Union had something to hide relating to Avileas' notes and her testimony. Despite the Employer's request that the HO draw an adverse inference that Avileas' notes and testimony would have established that Dorton was a supervisor as defined under section 2 (11) of the Act with respect to the employees in the dispatch office, including Garcia, the HO erroneously failed to draw such an adverse inference – a decision that essentially rewarded the Union and Counsel for making a mockery of the proceeding. In making this determination, the HO stated that she could not draw the type of adverse inference requested by the Employer because the Employer had failed to show that Avileas had knowledge of the dispatch office and Dorton's interaction with employees in the dispatch office, including Garcia. Initially, the Employer takes issue with the HO putting the burden on the Employer. The Employer participated in the proceeding in good faith and exhibited nothing but respect for the NLRB's procedures and protocol. Yet, according to the HO, such behavior gets you nowhere. In fact, the HO has turned things around by essentially declaring – CHEATERS PROSPER! If the type of conduct that was exhibited by the Union and

its Counsel can simply be dismissed by stating that the Employer did not adduce the very evidence it was precluded from producing, the integrity of the whole process is compromised.

Despite the above argument, the Employer also notes that the HO's finding that the Employer failed to adduce evidence that Avileas had had knowledge of the dispatch office and Dorton's interaction with employees in the dispatch office, including Garcia, is simply inaccurate. In this respect, the record evidence clearly establishes that Moncado filed a grievance with Avileas regarding Dorton's treatment of Moncado while Moncado was a member of the dispatch staff. As a result, it is beyond question that Avileas has personal knowledge about Dorton's day to day conduct as the Head Dispatcher and personal knowledge of Dorton's supervisory status over all of the dispatch employees, including Garcia. Accordingly, inasmuch as the basis for the HO's refusal to draw an adverse inference is not accurate, the Regional Director should find that the HO erred in not drawing an adverse inference and refuse to adopt the HOR.

3. The HO Erred In Determining That Moncado's Credible Testimony Was Not Sufficient To Establish That Dorton Is A Section 2(11) Supervisor With Respect To The Dispatch Employees.

Despite the HO's conclusion that Moncado's testimony was credible, open, and forthright, the HO improperly concluded that Moncado's testimony was not sufficient to establish that Dorton was a supervisor over employees in the dispatch office. Such a conclusion is improper as Moncado testified specifically to Dorton's authority not just over her as a temporary employee within the dispatch office, but she also credibly testified to Dorton's authority over other employees in the dispatch office as well. For example, Dorton had the ability verbally counsel not only Moncado, Dorton also verbally counseled other employees who worked in the dispatch office. (TR 300 - 301).

Additionally, the HO incorrectly concluded that Moncado's testimony regarding Dorton's authority over Garcia as her supervisor was not sufficient because Moncado is not a unit employee. Moncado not being a member of the bargaining unit is irrelevant to the analysis to whether Dorton is a 2(11) supervisor who directs the work of Garcia. Moncado testified competently and credibly regarding what she witnessed while she worked in the dispatch office. Moncado was able to directly witness Dorton exercise her supervisor authority over Garcia over an extended period of time (three to four months) (TR 291). Contrary to the HO's contention in her Report, Moncado did not testify to isolated or temporary instances of Dorton exercising her supervisor authority on Garcia, Becca, and others working in the dispatch office. Instead, Moncado provided credible evidence of Dorton's supervisory status over the employees in the Dispatch office, including Garcia. Accordingly, the Regional Director should find that the HO's conclusions are not based on the competent record evidence.

B. The HO Erred By Finding Dorton's Conduct Was Not Objectionable Supervisory Taint.

1. Statement Of The Law

The Board has long recognized that a supervisor's participation in a Union's organizational campaign will taint the Union's card majority where the supervisor's participation may be found to have deprived employees of the opportunity to exercise free choice in selecting a collective bargaining representative. Waldinger Corp., 331 NLRB No. 544, 545-56 (2000); *citing* Juniata Packing Co., 182 NLRB 934, 935 (1970), *enfd. in relevant part* 464 F.2d 153 (3d Cir.1972); El Rancho Market, 235 NLRB 468, 473 (1978). In order to establish that there has been supervisory taint in the solicitation of union authorization cards, the Board has held that the evidence must establish either that the supervisor's activity was such as to have implied to employees that their employer favored the union or that there is cause for believing the

employees were coercively induced to sign the authorization cards because of fear of supervisory retaliation. *Id.*; citing WKRQ-TV, Inc., 197 NLRB 174, 175 (1971); *enfd.* 470 F.2d 1302 (5 Cir.1973); Orlando Paper Co., 197 NLRB 380, 387 (1972); El Rancho Market, 235 NLRB 468, 473 (1978).

Additionally, the Board clarified and expanded the legal standard applicable when an employer challenges the results of an election alleging objectionable pro-union conduct in Harborside Healthcare, Inc., 343 N.L.R.B. 906 (2004). Under Harborside, the Board must consider two factors to determine whether supervisory taint has occurred. First, the Board must consider whether the supervisor's pro-union conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pro-union conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

Second, the Board must consider whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct. *Id.* According to the Board, "an express promise or threat is not a requirement for finding pro-union supervisory conduct objectionable." *Id.* Nevertheless, the Harborside inquiry seeks to foreclose conduct-however implicit or subtly framed-that, in the aggregate, pressures employees to support or oppose unions out of fear of retaliation. *Id.*

Lastly, under Harborside, objectionable conduct includes both "actual threats" and "implied threats of retaliation." *Id.* However, despite the Board's analysis looking for such actual

and implied threats, the Board in Harborside made it clear that such evidence is not a requirement when it stated:

In our view, however, absent mitigating circumstances, supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not. By definition, a supervisor has the power to affect—for good or for ill—the working life of the employee. The solicitation of cards gives the supervisor the opportunity to obtain a graphic illustration of who is pronoun and, by the process of eliminating nonsigners, who likely is not. When a supervisor asks that a card be signed, the employee will reasonably be concerned that the “right” response will be viewed with favor, and a “wrong” response with disfavor.

Id. at 911.

The facts established at hearing in the current proceedings, but improperly rejected by the HO, demonstrate that, Dorton made threatening and coercive pro-union statements to the eligible voters, including her subordinate Garcia, to induce the eligible voters to sign union authorization cards. Such evidence clearly constitutes objectionable supervisory taint pursuant to Harborside. In addition, the facts established at hearing, but improperly rejected by the HO, demonstrate that Dorton solicited signatures on Union authorization cards – conduct that, standing alone, constitutes objectionable supervisory taint pursuant to Harborside.

2. Application Of The Law To The Competent Record Evidence Clearly Establishes The HO Erred By Not Finding Dorton's Conduct To Be Objectionable Supervisory Taint

a. The HO Erroneously Determined That Dorton's Conduct Did Not Reasonably Tend To Interfere With The Exercise Of Free Choice In The Election.

i. Nature And Degree Of Supervisory Authority.

In the HOR the HO refused to make a finding as to Dorton's supervisory status with respect to the drivers and erroneously determined that Dorton was not a statutory supervisor with respect to the dispatch office employees, including Garcia. Thereafter, the HO determined that Dorton's statement could not be considered a threat of retaliation that reasonably coerced or

interfered with employees' free choice in the election because the eligible voters don't report to Dorton.

As established *supra*, however, under controlling precedent a determination by the HO as to whether Dorton, as the Lead Dispatcher, is a statutory 2(11) supervisor over the drivers is relevant to the issue of whether Dorton's conduct reasonably tended to interfere with the exercise of free choice in the election. Moreover, even a cursory review of the competent evidence irrefutably establishes Dorton is a statutory supervisor over the drivers inasmuch as she has the authority to direct the work of drivers and dispatch employees, grant and approve time off for employees, and verbally counsel/reprimand employees. As such, the Regional Director must refuse to adopt the HOR.

In addition, as established *supra*, contrary to the HO's finding eligible voters including Garcia do report to Dorton. In fact, Myers, an eligible voter, specifically testified that Dorton was dispatcher Garcia's direct supervisor insofar as she directs Garcia's work and many times verifies whether Garcia has performed the tasks Dorton has directed her to complete (TR 590-91). In addition, Dorton counsels Garcia or anyone performing dispatch duties regarding their job performance (TR 252). As such, the evidence established at hearing demonstrates Dorton is a supervisor pursuant to the Act, and is the direct supervisor of dispatcher and eligible voter, Garcia. Therefore, inasmuch as the HO's determination that Dorton's conduct did not tend to reasonably interfere with the exercise of free choice in the election is based on the HO's erroneous determination that Dorton was not a statutory supervisor over the employees in the dispatch office, including Garcia, the Regional Director must refuse to adopt the HOR.

ii. Nature Of The Objectionable Conduct.

At hearing Myers credibly testified that during a Union meeting Dorton engaged in threatening and coercive conduct intended to induce the eligible voters, including her subordinate, Garcia, to sign a union authorization card. Specifically, in order to obtain the signatures of all the employees, including the signature of dispatcher Garcia, Myers testified that Dorton stated to the entire group of employees, “If you want your job, you better sign this card” (TR 610). Finally, Myers specifically testified at hearing that she understood this statement to be a threat to the group of employees (TR 600).

Initially, it is imperative to note that under any objective standard a statement like the one made by Dorton is clearly an actual threat of retaliation against the employees, including Garcia, if they did not sign a union authorization card. This statement is a clear indication that Dorton knew that she wielded the power to affect the employees’ working life and was willing to threaten these employees’ livelihoods in order to gain support of the Union. The testimony by Myers clearly established the employees who attended the Union meeting understood Dorton’s statement as a threat of reprisal and retaliation if they refused to sign the union authorization cards (TR 600). As the Board stated in Harborside, when a supervisor asks that a card be signed, the employee will reasonably be concerned that the “wrong” response will be viewed with disfavor. However, in the instant case, none of the other eligible voters had to wonder whether refusing to sign the union authorization cards would be viewed with disfavor with Dorton. Dorton’s statement made it clear that Dorton would use her supervisory power to affect the entire group’s working conditions, including her direct subordinate Garcia’s working conditions, if the employees at the meeting refused to sign an authorization card.

In the HOR, the HO credited Myers testimony and found that Dorton made the above statement to members of the voting unit during a union meeting. Inexplicably, however, despite finding that the statement was made by Dorton, the HO ignored Myers credible testimony that she took Dorton's statement as a threat and determined that the statement was not threatening in nature. The HO's determination in this respect is erroneous and inconsistent with applicable precedent. In support of this erroneous determination, the HO initially argues that because Dorton is a "low-level" supervisor, no employee could reasonably interpret Dorton's statement at the Union meeting to be a threat. Then the HO engages in a subjective leap of logic by concluding that because of this, the employees reasonably interpreted Dorton's statement as an "expression of her own view that unionization would lead to job security rather than a threat to retaliate against employees who did not support the Union" (see HO's Report). The HO's subjective conclusion regarding the interpretation of Dorton's statement was in error as she completely ignored the record evidence presented by Employer's witness, Myers, who testified she interpreted the statement as a threat of retaliation. Further, the Union failed to present any evidence to contradict Myer's testimony that the statement was interpreted as a threat by bargaining unit employees.

Despite there being no rebuttal or contradictory evidence presented by the Union regarding Dorton's statement, the HO took it upon herself to ignore, disregard, and contradict uncontroverted testimony by Myers. The HO's subjective leap of logic regarding the bargaining unit employees' interpretation of Dorton's statement was unwarranted and improper. Ultimately, there was no evidence presented at hearing which could lead the HO to the conclusion that Dorton's statement was merely an expression of her view that unionization would lead to job security. The HO found Myers to be a credible witness yet she completely ignored Myers'

uncontroverted testimony evidence and came to her own contradictory subjective conclusion. Accordingly, the HO's conclusion in this regard is not based on the facts presented at hearing or applicable law and must not be adopted by the Regional Director.

b. The HO Erroneously Determined That Dorton's Conduct Did Not Interfere With Freedom Of Choice To The Extent That It Materiality Affected The Outcome Of The Election.

The Regional Director must conclude that Dorton's threatening conduct interfered with the employees' free choice to make an untrammelled decision on the issue of unionization. In an election with only seven (7) eligible voters and a final tally of 4 to 2 for the petitioning labor organization, such a threatening comment made to the eligible voters clearly would have materially affected the outcome of the election. Based strictly on the Union's margin of victory, the Employer would have only needed a shift of one (1) vote to change the outcome of the election. When examining Dorton's threatening and coercive statement, a threat of job loss, retaliation, or reprisal by a supervisor is more likely than not to have a material effect on an employee's decision during a secret ballot election. In such a small bargaining unit of eligible voters, such a threat merely needs to have an impact on one (1) employee to change the outcome of the election.

Also, because this statement was made to the all of the eligible voters, except one (1), Dorton's threat of job loss if eligible voters failed and/or refused to sign the union authorization cards was clearly widespread within the eligible voting unit. This was not an isolated issue that was only heard or directed at one employee. Instead, this was a statement made to all the eligible employees except for one.

Lastly, as ruled in Harborside, because Dorton's conduct consisted of threats of job loss if the eligible employees did not sign a union authorization card, the conduct has a lingering effect.

343 NLRB 906, 913 (2004). The Board has a long standing precedent that threats of job loss are highly coercive and one of the most serious for of election misconduct. Waste Management, Inc., 330 NLRB 634, 634 fn. 22 (2000); Lake-Haven Nursing Home, 325 NLRB 250, 251 (1997). In addition, testimony at hearing established that Dorton was an adamant union supporter, who assisted with scheduling meetings, communicating with the Union, and spoke in favor of the Union throughout the Union's organizing campaign. As a result of Dorton's ongoing support of the Union throughout its campaign, Dorton's conduct would have a lingering effect.

The HO incorrectly concluded in the HOR that because the Employer engaged in an anti-union campaign, Dorton's coercive and threatening statement was mitigated. In support of its position in this respect, the Employer notes that the record evidence regarding an anti-union campaign in that the Employer held meeting and, without making any promises, asked the eligible voters a chance. (TR 740-750). Such evidence hardly qualifies as an anti-union campaign and, as such, the HO's finding that the Employer engaged in an anti-union campaign is erroneous. More importantly, while the Union presented evidence of some of the messaging presented by the Employer during its campaign, the record is void of any evidence that the Employer learned of Dorton's threatening and coercive statement and took timely and effective steps to disavow it to the employees prior to the election. Harborside, 343 NLRB 906, 914 (2004). Thus, under the analysis established by the Board in Harborside, even if the employer engaged in an anti-union campaign it is irrelevant if the Employer did not have the opportunity to disavow Dorton's coercive statement. Thus, the HO's conclusion that the Employer's antiunion campaign mitigated Dorton's threatening and coercive conduct is a misapplication of the law.

Accordingly, because of the close margin of victory, the widespread nature of Dorton's conduct, and the lingering effect of Dorton's conduct, taken together, the Regional Director must

find that Dorton's conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election.

c. Dorton's Solicitation Of Signatures On Union Authorization Cards In Of Itself Is Objectionable Conduct.

Dorton's solicitation of signatures for union authorization cards in of itself is objectionable conduct because of Dorton's supervisory status over the drivers and over employees in the dispatch office, including unit employee Garcia. As the Board ruled in Harborside, supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom. Id. at 911. Dorton's supervisory authority over drivers as well as Garcia could affect the working life of employees. As a supervisor, Dorton's solicitation of cards gave her opportunity to obtain a graphic illustration of who is prounion and, by the process of eliminating nonsigners, who likely is not. Id. Accordingly, pursuant to the Board's well-established precedent in Harborside, Dorton's solicitation of signatures alone is objectionable conduct which reasonably interfered with the employees' right of free choice and the HO erred by failing to address this fact

3. The HO Erred By Ignoring Controlling Precedent

Additionally, the HO's reliance on Glen's Market, 344 NLRB No. 25 (2005), for the blanket proposition that coercive supervisory conduct targeted towards one who is not the supervisor's direct subordinate cannot be objectionable is in error. In Millard Refrigerated Servc., 345 NLRB 1143, 1145-46 (2005), the Board held that the decisions in Harborside and Glen's Market do not stand for the proposition that coercive supervisory conduct towards an employee who is not the supervisor's direct subordinate cannot be objectionable. The Board specifically stated:

Our dissenting colleague, citing Glen's Market, 344 NLRB No. 25 (2005), suggests that we should not "include" the solicitation of Elliott, because he was solicited by supervisor Rork rather than by his direct supervisor, Steen. We disagree. First, while it is true that supervisor Rork appears to have beaten supervisor Steen to the punch, so to speak, Elliott plainly testified that his supervisor, Steen, like Rork, was also busy soliciting and collecting cards. Thus, Elliott would reasonably conclude that his own supervisor, Steen, was as desirous of Elliott's signature as was Rork. Second, we do not view Glen's Market as standing for as broad a proposition as the dissent suggests. In our view, neither Harborside nor Glen's Market stands for the proposition that supervisory conduct, no matter how coercive, targeted towards one who is not the supervisor's direct subordinate cannot be objectionable. The principles of Harborside are not rendered inapplicable simply because prounion supervisors target their coercive conduct only at the subordinates of other prounion supervisors. (emphasis added).

Millard Refrigerated Servc., 345 NLRB 1143, 1145-46 (2005).

Thus, pursuant to the Board's ruling in Millard, the HO's citation of Glen's Market for the broad proposition that Dorton's coercive and threatening statement of retaliation could not be objectionable is a misapplication of well-established Board precedent. Whether Dorton was Myers' supervisor or not, such a coercive and threatening statement of retaliation could reasonably coerce or interfere with employees' free choice in the election.

Further, the Board held conduct similar to the conduct in the instant case was objectionable supervisory taint where several supervisors solicited union cards from employees, including those directly on their crew. Millard Refrigerated Servc., 345 NLRB No. 95 (2005). Even more similar, the Board in Millard held there was supervisory taint where one supervisor told employees, "if the union does not get in, everybody will probably be fired" and that same supervisor told the group he would "make their lives a living hell" if they didn't support the Union. Id.

The conduct and statements by supervisors discussed in Millard was held to be objectionable conduct because of the threatening and coercive nature of the statements.

Likewise here, Dorton's pro-union conduct and statements were stated to a group of eligible employees, including an employee she directly supervises (Adela Garcia) and threatened the job security of the employees in order to induce the employees to sign authorization cards and support the Union. Clearly, when examining the nature, extent, and context of Dorton's statement of "If you want your job, you better sign this card," one must conclude that Dorton's conduct constitutes objectionable supervisory taint.

C. The HO Erred By Not Finding That The Union Either Told Eligible Voters That The Employer Illegally Challenged Dorton And Corley's Vote Because Of Their Race Or That The Union Failed To Repudiate An Employee's Statement That The Employer Illegally Challenged Dorton And Corley's Vote Because Of Their Race.

In the HOR, the HO found that there was no competent evidence that prior to the election, the Union either told eligible voters that the Employer was going to illegally challenge Dorton and Corley's Vote because of their race or that the Union failed to repudiate an employee's statement that the Employer illegally challenged Dorton and Corley's vote because of their race. In support of this finding the HO stated that Smith, Union's Business Agent admitted talking to eligible voters two nights before the election about the Employer's intention to challenge that Smith did not admit that the parties to the conversation discussed that the Employer's intent to challenge was racially motivated. Instead, the HO noted that when Smith was asked if parties to the conversation discussed the possibility that the Employer's intent to challenge was racially motivated, Smith only admitted that it was possible. The HO's determination that race was not referenced in relation to the Employer's decision to challenge ballots was erroneous and inconsistent with the record evidence.

Smith is African American. As such, it is logical to believe that if the issue of race were brought up during a conversation, Smith would remember it and if race was not brought up during a conversation, he would expressly deny that race was discussed. At hearing, however,

Smith, when asked if he and eligible voters discussed that the Employer's decision to challenge ballots was racially motivated, stated, "It was possible." (Tr 342). It defies common sense to believe that Smith would answer in such a manner if race was not discussed. Instead, if the parties did not discuss that the Employer's challenges were racially motivated, Smith would have responded to the above question with a negative response. As a result, it is beyond question that during the conversation between Smith and eligible voters two days before the election the participants to the call engaged in a discussion regarding the Employer's decision to challenge ballots being racially motivated.

As further support for the Employer's position in this respect, the Employer relies on the fact that Smith's business associate Bender fabricated notes regarding the Union's discussion with eligible voters regarding the Employer's decision to challenge ballots. Stated another way, the clear impetus for Bender's fabrication of notes was to provide the Union with a defense to the Employer's Objection regarding race. The bottom line is the Union knew that race was mentioned as a basis for the Employer's decision to challenge the ballots of Corley and Dorton during a phone call between Smith and eligible voters shortly before the election. The Union further knew that Smith did not address the racial allegations or refute them in any way. Therefore, in order to argue that said conversation never took place the Union fabricated EX-27 so that the Union could argue that the issue of the challenged ballots came up during the Union meeting and the Union addressed said issue consistent with applicable law and in a non-coercive manner.

The Board in Sewell Mfg. Co., 138 NLRB 66 (1962), held that it would set aside elections when a party embarks on a campaign which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals. 138 NLRB at 72. While the Board in Shawnee

Manor, 321 NLRB 1320 (1996), held the applicability of Sewell to third-party racial remarks that were made by a pro-union employee were not sufficient to set aside an election, such remarks possibly could be if they inflamed and tainted the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility. Id.

Here, the facts are clear that on May 7, 2015, the night before the secret ballot election, Dorton, Sherry Head, and Comandao, learned that the Employer was challenging the votes of Dorton and Corley (TR 616). During a phone conversation with Smith, someone raised the issue of racism by the Employer as the reason for challenging Dorton and Corley's votes (TR 342). Instead of rejecting and/or repudiating such statements or claims by one of the employees, Smith merely brushed it off (TR 342).

Additionally, the facts established at hearing clearly show the injection of race inflamed and tainted the atmosphere in which the election was held. At hearing, Comandao testified that prior to May 7, 2015, she had decided that she was going to vote no, but as a result of learning that the Company challenged Dorton and Corley's votes, she became very upset and changed her vote to a yes (TR 616-17). The Union's silence and failure to repudiate the injection of race as Employer's basis for challenging the votes the day before the secret ballot election clearly inflamed and tainted the atmosphere in which the election was held to the extent choosing or rejecting a bargaining representative in a reasoned manner was an impossibility for Comandao.

D. The Imposition Of The New NLRB Rules And Regulations Violate The Employer's Rights And Prejudiced The Employer.

The imposition and implementation of the Board's new rules and regulations violated the Employer's procedural due process rights and prejudiced the Employer in these proceedings. For the reasons articulated by the Plaintiff's in their Complaints and other filings in Chamber of Commerce of the United States v. NLRB, 1:15-cv-00009 (D. D.C.2015); Assoc. Builders and

Contractors of Texas, Inc. v. NLRB, 1:15-cv-00026 (W.D.Tex.2015); and Baker DC, LLC v. NLRB, 1:15-cv-00571 (D.D.C.2015), the Employer objects to the application of the new NLRB Rules and Regulations, specifically entitled “Representation Case Procedures; Final Rule,” C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74, 439, effective April 14, 2015 (“the New Rule”) in these proceedings.

The imposition of the New Rule in these proceeding violated the Employer’s due process rights because the passage and imposition in representation proceedings was arbitrary and capricious under the Administrative Procedure Act. Imposition of the New Rule also unlawfully compelled the Employer to violate the personal privacy rights of its employees by forcing the disclosure of employees’ personal email addresses and phone numbers. The New Rules also unconstitutionally compelled the Employer to speech. The New Rule further compelled an election timeframe that interfered with the Employer’s rights under Section 8(c) of the National Labor Relations Act, as the Employer did not have adequate opportunity to exercise its right to free speech in the compressed timeframe imposed by the New Rule. This ultimately results in frustration of the bargaining unit employee’s Section 7 rights, as the lack of a full and fair debate on the relative merits of unionization frustrated their right to refrain under the Act.

Moreover, the Employer objects to the implementation of Sec. 102.69(a) of the New Rule which required the Employer’s Objections to be filed with the Regional Director with a written offer of proof within seven (7) days after the tally of ballots has been prepared with the regional director. Under prior rules, parties had fourteen (14) days from the preparation of the tally of ballots to submit an offer of proof in support of objections. The reduction of time for the Employer to file its Objections and offer of proof prevented the Employer from having the requisite time to properly preparing its Objections to be presented in front of the Hearing Officer.

Such a reduction of time for the Employer to obtain and present its evidence to support its Objections prejudiced the Employer.

The Employer submits that the imposition of the New Rules in this matter materially affected the outcome of the election. Thus, the Employer respectfully requests that the Regional Director reject the Hearing Officer's Report on Objections on the grounds set forth herein.

V. CONCLUSION

WHEREFORE, for the reasons stated herein, as well as those reasons stated in the Employer's Exceptions, the Employer respectfully requests that the Regional Director refused to adopt the HOR and that the Regional Director set aside the May 8, 2015 election and order a new election be held.

Respectfully submitted,

McMAHON BERGER, P.C.

_____/s/ Geoffrey M. Gilbert
Geoffrey M. Gilbert
Dean Kpere-Daibo

Dated: July 14, 2015

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

DURHAM SCHOOL SERVICES, L. P.

Employer

and

Case 32-RC-150090

TEAMSTERS LOCAL 853, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHANGE TO
WIN

Petitioner

DECISION AND
CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement, an election was conducted on Friday, May 8, 2015 in a unit of the Employer's full-time and part-time routers, dispatchers, payroll department employees, and office administrators. The tally of ballots showed that of the approximately seven eligible voters, four ballots were cast for Teamsters Local 853, International Brotherhood of Teamsters, Change to Win (the Petitioner), and two ballots were cast against representation. There was one non-determinative challenged ballot. Therefore, the Petitioner received a majority of the votes cast.

Durham School Services, L.P. (the Employer) timely filed four objections. On June 30, 2015, the Hearing Officer issued a report in which she recommended overruling the objections in their entirety. The Employer filed exceptions to the hearing officer's recommendations.

In its exceptions, the Employer contends that the Hearing Officer erred in ruling that: (1) the Employer failed to prove that Michelle Dorton holds Section 2(11) supervisory authority over any of the eligible voters; (2) Dorton's pronoun conduct would not have reasonably coerced the free choice of employees who she does not directly supervise; and (3) the evidence is insufficient to establish that there was any suggestion during the critical period that the Employer's decision to challenge certain ballots was racially motivated.

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. I have considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the Hearing Officer that all of the Employer's objections should be overruled. Accordingly, I am issuing a Certification of Results of Election.

I. THE OBJECTIONS

Objection 1: The Employer's objection states that the pronoun coercive conduct of a supervisor reasonably tended to interfere with the eligible voters' freedom of choice in the election and materially affected the outcome of the election.

Durham School Services, L. P.
Case 32-RC-150090

Objection 2: The Employer's objection states that the coercive conduct of a supervisor reasonably tended to interfere with the employees' freedom of choice whether to sign or not sign a union authorization card.

Objections 1 and 2 relate to the alleged supervisory status and prounion conduct of lead dispatcher Michelle Dorton. I find that the Hearing Officer did not err in determining that there was insufficient evidence to establish that Dorton is a statutory supervisor of dispatch employees; the Hearing Officer did not err in failing to make a finding that Dorton exercises supervisory authority over non-unit drivers; and the Hearing Officer did not err in finding that even if Dorton were a statutory supervisor of non-unit drivers, her conduct would not be objectionable under the Board's holding in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004).

Dorton's Supervisory Status

The Employer first asserts that the Hearing Officer ignored competent record evidence in determining that lead dispatcher Dorton is not a Section 2(11) supervisor with respect to dispatch employees. Specifically, the Employer takes exception to the hearing officer's determination that Paula Moncado's credible testimony was not sufficient to establish that Dorton holds supervisory authority over dispatch employees. The Employer contends that Dorton supervises dispatcher Adela Garcia, but did not present Garcia as a witness.

I find that the Hearing Officer did not err in finding that there was insufficient evidence to establish that Dorton supervises dispatch employees. Moncado is a non-unit driver who was temporarily assigned to dispatch while she was on light duty. The Hearing Officer credited Moncado's testimony that she was told to get assignments from Dorton, that Dorton issued minor instructions and oral rebukes to Moncado, and that Dorton told Moncado when she could leave to attend doctor's appointments. The hearing officer's report explained, however:

In the absence of any testimony from Garcia, I cannot conclude that Moncado's temporary arrangement with Dorton is dispositive of whether Dorton exercises any supervisory authority over Garcia. In this regard, because Moncado was a driver who was only working in dispatch temporarily while she was on light duty, it follows that she would need guidance and instruction from Dorton where Garcia would not.

I find the Hearing Officer did not err in concluding that Moncado's testimony regarding her temporary arrangement with Dorton is not dispositive of whether Dorton exercises supervisory authority over Garcia and other dispatch employees. Moreover, as correctly noted by the hearing officer, the issuance of routine instructions to employees does not establish supervisory authority, especially where the assignments are not based on anything other than the common knowledge of employees in a small workplace. See, *Sears Roebuck & Co.*, 292 NLRB 753, 754 (1989); and *Armstrong Machine Co., Inc.*, 343 NLRB 1149, 1150 (2004).

The Employer also asserts that Administrator Shirley Myers' testimony that Dorton assigns work to Garcia establishes that Dorton is a Section 2(11) supervisor. However, as the Hearing Officer correctly concluded, Myers' testimony establishes, at most, that Dorton issues

Durham School Services, L. P.
Case 32-RC-150090

only routine instructions to Garcia.¹ Supervisory status is not established where work assignments are routine in nature. *Sears Roebuck & Co.*, 292 NLRB 753, 754 (1989). Further, authority to issue instructions and minor orders based on greater job skills does not amount to supervisory authority. *Byers Engineering Corp.*, 324 NLRB 740 (1997). Consequently, the Hearing Officer aptly observed that Dorton's issuance of minor guidance to Garcia may well have been a result of her greater experience and expertise rather than any supervisory relationship." Thus, I find that the Hearing Officer did not err in concluding that Dorton is not a Section 2(11) supervisor with respect to dispatch employees.²

Dorton's Prounion Conduct

I find that the Hearing Officer did not err in concluding that even if Dorton were a Section 2(11) supervisor her conduct would not be objectionable under the Act. The Hearing Officer assumed, but did not find, for purposes of her analysis, that Dorton met the statutory definition of a supervisor with respect to the non-unit drivers. Contrary to the Employer's assertion, the Hearing Officer was not obligated to make a finding of supervisory authority over the drivers under these circumstances. The Hearing Officer deemed such a finding unnecessary because she found that even if Dorton were a supervisor of the non-unit drivers, her conduct would not be objectionable under *Harborside*. 304 NLRB 906.

The Hearing Officer correctly articulated and applied the proper authority in her report. She states that in analyzing whether alleged supervisory prounion conduct upsets the requisite laboratory conditions for a fair election, the Board looks at two factors:

1. Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with employees' exercise of free choice in the election, including (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the

¹ I also note, that on cross-examination, Myers testified explicitly that Operations Supervisor Sandra Wilson was Garcia's supervisor, not Dorton. When asked on cross-examination "[I]s it your testimony that Sandra Wilson is the direct supervisor of the folks who were able to vote on May 8th?" Myers responded, "Some of them. Not all of them." She specified that "[Wilson] would be Adela's and Michelle's," referring to Garcia and Dorton.

² In its Exceptions, the Employer argues that the Hearing Officer erred by refusing to draw a negative inference against the Petitioner because of its failure to comply with a subpoena ad testificandum seeking to compel the testimony of business agent Stacy Alvelais and a subpoena duces tecum seeking a legible copy of Alvelais' notes of a meeting with the Employer during which Dorton was discussed. The Employer further argues that the Hearing Officer erred by failing to rely on this negative inference to conclude that Dorton has supervisory authority over the entire dispatch office. I reject this invitation to draw a negative inference. In this regard, the Hearing Officer correctly reasoned that since none of the Employer's witnesses to this meeting testified that the subject of the dispatch employees was discussed, it would be inappropriate to draw a negative inference and to effectively discredit the Employer's own witnesses based on the mere fact that the Petitioner failed to produce either Alvelais or her notes. See, e.g., *Lone Star Industries*, 279 NLRB 550 (1986) (Board found it unnecessary to draw negative inference against Respondent where Respondent's other witness gave uncontroverted testimony adverse to Respondent's interests). Moreover, as discussed below, I also agree with the Hearing Officer's reasoning that the Employer has not been prejudiced by this refusal since, even assuming that Dorton is a statutory supervisor with respect to the drivers, her conduct was not objectionable.

Durham School Services, L. P.
Case 32-RC-150090

prounion conduct and (b) an examination of the nature, extent, and context of the conduct in question.

2. Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; (e) the lingering effect of the conduct. *Harborside*, 343 NLRB at 909.

The Hearing Officer also correctly relied on legal authority that supervisory solicitation is not objectionable where the soliciting supervisor has no authority over the employee being solicited. *Glen's Market*, 344 NLRB 294 (2005).³

Applying *Harborside* to Dorton's comment at a union meeting that "If you want your job, you better sign this card," the Hearing Officer concluded that even assuming Dorton holds supervisory authority over non-unit drivers, Dorton's statement would not reasonably tend to coerce unit employees. In this regard, the record does not establish that any of the eligible voters report to Dorton. Thus, the evidence is insufficient to establish that her prounion conduct would have reasonably coerced or interfered with unit employees' free choice to sign authorization cards or vote in favor of the Petitioner, because Dorton exercised no authority over those employees.

The Employer argues that the Hearing Officer improperly concluded that Dorton's statement was not threatening. However, the Hearing Officer did not err in finding that a reasonable employee would not interpret Dorton's comment as a threat of job loss. The Hearing Officer observed that there is no record evidence that Dorton has any involvement in hiring, firing, or disciplining employees, and thus reasoned:

Dorton therefore has no power to carry out a threat of job loss. In these circumstances, an employee would reasonably interpret Dorton's comment as an expression of her own view that unionization would lead to job security rather than a threat to retaliate against employees who did not support the Petitioner.

Although Administrator Myers may have found Dorton's statement threatening, her subjective reaction is not relevant for our analysis. See *Picoma Industries*, 296 NLRB 498, 499

³ Citing *Millard Refrigerated Services*, 345 NLRB 1143 (2005), the Employer argues that the Hearing Officer erroneously relied on *Glen's Market*. However, the holdings in the two cases are not at odds. *Millard* stands for the principle that where a group of supervisors are working together to engage in coercive prounion conduct, and the supervisors hold broad authority over the unit employees, such conduct does not become nonobjectionable simply because some lines of supervision are crossed. *Millard*, 345 NLRB at 1145-46. Here, this is not the case as there is no evidence in the record that Dorton worked together with other supervisors to engage in prounion conduct and there is insufficient evidence in the record to establish that she held any authority over unit employees.

Durham School Services, L. P.
Case 32-RC-150090

(1989); see also *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980), *enfd.* 649 F.2d 589 (8th Cir. 1981).⁴

For the above reasons, I find that the record evidence is not sufficient to support the conclusion that a reasonable employee would objectively interpret Dorton's statement as a threat of job loss. Rather, Myers' testimony supports the fact that Dorton was expressing her strong opinion on unionization and job security. Thus, I find that the Hearing Officer did not err in finding that even assuming that Dorton were a Section 2(11) supervisor over non-unit drivers, her pronoun conduct would not be objectionable. Accordingly, I find that the Hearing Officer did not err in failing to make a determination as to Dorton's supervisory status over non-unit drivers.

Objection 3: The Employer's objection states that the Petitioner, through its agents and representatives, restrained employees in the exercise of their rights by implying that an Employer would unlawfully challenge a vote against the Petitioner.

Objection 4: The Employer's objection states that the Petitioner, through its agents and representatives, coerced and intimidated employees into voting yes by advising employees that the Employer's lawful challenge was going to prevent pro-union employees from having the opportunity to exercise their right to vote.

In its brief in support of its Exceptions to the hearing officer's report recommending that Objections 3 and 4 be dismissed, the Employer argues that the Petitioner committed objectionable conduct by failing to repudiate the interjection of race or racist motivations for the Employer's ballot challenges of Dorton and Darlene Corley, both of whom are African American. In so arguing, the Employer relies primarily on testimony from router Candace Comandao that, the day before the election, she overheard a telephone conversation on speakerphone between Dorton and router Sherry Head. Comandao testified that she heard Head and Dorton talking about why they could not vote and that they were very upset that the Employer was challenging their ballots. She also recalled some mention that the challenges were based on their purported supervisory status. Comandao further testified that based on that conversation, she decided to change her vote from a "no" to a "yes" vote. Comandao explained that she was very upset because she "didn't know how you cannot have somebody vote in America in an election, period." Notably, Comandao did not recall any mention of the

⁴ Further, Myers testimony suggests that she was not so concerned with the threat of job loss, but rather with being ostracized by her fellow coworkers if she voted against the Petitioner. Myers testified that she asked Dorton if she were to vote no, "Would the group hold it against that person?" She further testified, "I was concerned because the girls had been working together so long ... they're a click," referring to other unit employees. She went on, "I was concerned about how they would react if I voted no." Myers testimony, taken as a whole, suggests her subjective reaction was that she was anxious that she may be treated differently by her coworkers, including Dorton, if she voted against the Petitioner.

Durham School Services, L. P.
Case 32-RC-150090

challenges to the ballots of Dorton and Corley being race based and, significantly, she was not asked and did not testify whether Petitioner Representative Smith took part in this call.⁵

In support of these two objections, the Employer also relies on testimony from Smith that, a few days before the election, he had a telephone conversation with Dorton and at least one other unit employee (whose name he could not recall) in which they discussed the challenge procedure. The Employer did not present any direct evidence that this was the same telephone conversation that Comandao testified about. During his testimony, Smith denied that he mentioned in this phone call the idea that the Employer's challenges to the votes of Dorton and Head were race based. He further testified that while it is "possible" that someone else in this speakerphone call may have mentioned the subject of racism, he is certain that if they did, he would have just "brushed it off." Smith further testified that during this conversation on speakerphone, he did specifically recall explaining that voter challenges were a normal practice and that both unions and employers challenge the eligibility of voters.⁶

Smith testified that he did not recall if any statement was made involving race, but was certain that he did not make any such statement. He further testified that had such a statement been made, he would have "brushed it off." This record evidence is not sufficient to find that such a statement was made before the election and the Petitioner failed to refute it. There is no other testimony regarding any statement in the critical period relating to any Employer ballot challenge based on race. Further, there is no testimony that the Petitioner ever characterized any Employer challenges as "unlawful" or "illegal" in communications with eligible voters.⁷

⁵ Importantly, Comandao testified that although she attended two union meetings in the period leading up to the election, she did not recall any discussions in those meetings about the challenge procedure. As such, given that Comandao did not testify that any Petitioner representative took part in the telephone conversation that she overheard, Comandao's testimony provides no support for Objections 3 and 4's allegation that the Petitioner told employees that the Employer's ballot challenges were racially based.

⁶ In support of these objections, the Employer also asserts that the Hearing Officer erred in not taking an adverse inference against the Petitioner in light of Petitioner Business Agent Steve Bender's fabricated summary notes. The notes allegedly show that he explained the ballot challenge procedure to unit employees at a union meeting prior to the election. The Hearing Officer called into question the reliability of Bender's testimony and his notes in her report, since Bender admitted that he no longer had the originals in his possession and he had copied his notes onto another piece of paper and destroyed the originals. Accordingly, she correctly only relied on Bender's testimony to the extent that it could be corroborated elsewhere in the record. In its Exceptions, the Employer argues that the Hearing Officer should have gone further and drawn the inference that the Petitioner fabricated evidence and should have concluded that the Petitioner falsely adopted the position that the Employer was engaging in illegal conduct by challenging ballots based on race. However, such an inference cannot reasonably be drawn from the evidence in the record. In this regard, as the objecting party, the Employer has the burden of proof to come forward with affirmative evidence to support its objections. This burden cannot be met by simply discrediting or impeaching the Petitioner's denials that it engaged in objectionable conduct.

⁷ The Employer also argues that the Petitioner committed objectionable conduct by failing to dispute another employee's statement regarding the Employer's election challenges being based on race. However, the only evidence presented in support of this objection was Administrator Myers' testimony that, while the votes were being counted, she heard unit employee Candace Comandao speculate regarding certain of the Employer's election challenges "I think it's a race thing. The only two black females out of the group they call supervisors." As a

Durham School Services, L. P.
Case 32-RC-150090

Therefore, I find the Hearing Officer properly concluded that the record contains no evidence that an agent or representative of the Petitioner, or even an employee, speculated about racist motivations behind the Employer's ballot challenges until after the employees had cast their ballots. Thus, I find that the Hearing Officer did not err in finding that the record contains no evidence that employees' votes could have been influenced by the suggestion from the Petitioner that the Employer's challenges were based on racial discrimination or other unlawful motives.⁸

The Employer's Objection That The Imposition Of The New NLRB Rules And Regulations Violated The Employer's Rights And Prejudiced The Employer

Finally, in its Exceptions Brief, the Employer asserts (for the first time) that "the imposition and implementation of the Board's new rules and regulations violated the Employer's procedural due process rights and prejudiced the Employer in these proceedings. For the reasons articulated by the Plaintiff's in their Complaints and other filings in *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C.2015),⁹ *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D.Tex.2015),¹⁰ and *Baker DC, LLC v.*

threshold matter, this testimony, if credited, establishes only that if such a statement was made, it was made after the polls had closed. As such, this statement could not possibly materially affect the outcome of the election since the votes had already been cast. In this regard, it is black letter law that to be objectionable, conduct must have occurred during the critical period – i.e. the period between the date of the filing of the petition and the closing of the polls. Since this alleged statement was made after the polls closed, it could not be objectionable. See, *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). Postelection conduct by the parties will not ordinarily be grounds for setting aside an election. *Mountaineer Bolt*, 300 NLRB 667 (1990). Further, even if I were to consider this post-election statement, I agree with the Hearing Officer's conclusion that there was no evidence in the record that an agent or representative of the Petitioner made this statement. Nor was there evidence that a representative of the Petitioner was present to repudiate this employee's statement or had any knowledge that the statement was even made.

⁸ In so concluding, I reject the Employer's arguments on brief that the Board's decisions in *Sewell Mfg. Co.*, 138 NLRB 66, 71 (1962), and *Shawnee Manor*, 321 NLRB 1320 (1996) support its position that the Petitioner engaged in objectionable conduct. In these cases, the Board reasoned that its ultimate consideration is whether the action "lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election." 138 NLRB at 71. This is clearly not the case here. Moreover, as noted in *Durham School Services, LP*, 360 NLRB No. 86 (2014), "the Board has adhered to the distinction between *Sewell's* condemnation of a "sustained course of conduct, deliberate and calculated in intensity, to appeal to racial prejudice" and "isolated, casual, prejudicial remarks." *Beatrice Grocery Products*, 287 NLRB 302, 302 (1987), enf'd. mem. 872 F.2d 1026 (6th Cir. 1989). See also *Seda Specialty Packaging Corp.*, 324 NLRB 350, 352 fn. 5 (1997) (employer's comments in single meeting that union agent was racially prejudiced did not warrant overturning election). As in *Durham* and *Beatrice*, *supra*, here, there was no demonstration of a sustained appeal to racial prejudice by the Petitioner.

⁹ In *Chamber of Commerce of the United States v. NLRB*, the Plaintiffs asserted that the Final Rule (1) is not in accordance with the Act, exceeds the Board's statutory authority, and violates the First and Fifth Amendments of the US Constitution; and (2) is arbitrary and capricious under the APA.

¹⁰ In *Associated Builders and Contractors of Texas, Inc. v. NLRB*, the Plaintiffs asserted that the Final Rule: (1) exceeds the Board's statutory authority by impermissibly restricting employers' ability to prepare for, present evidence relating to, and fairly litigate issues of, unit appropriateness and voter eligibility in petitioned-for bargaining units; (2) violates the Act and the APA by failing to assure to employees the fullest freedom in exercising the rights guaranteed by the Act by compelling the invasion of privacy rights of employees by disclosure of personal

Durham School Services, L. P.
Case 32-RC-150090

NLRB, 1:15-cv-00571 (D.D.C.2015),¹¹ the Employer objects to the application of the new *NLRB* Rules and Regulations, specifically entitled "Representation Case Procedures; Final Rule," C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74, 439, effective April 14, 2015 ("the Final Rule") in these proceedings.

In addressing this objection, as a threshold matter, I note that the Employer failed to raise this same objection either in its objections to the election or in its brief to the Hearing Officer. As such, the Employer has waived this argument and is precluded from raising it for the first time in its Exceptions to the Hearing Officer's Report. Nevertheless, I will proceed below to address this argument on its merits.

The Employer first objects to the imposition of the Final Rule in the instant proceeding, asserting the Final Rule violated its due process rights because its passage and imposition in representation proceedings was arbitrary and capricious under the Administrative Procedure Act (the APA). Thus, the Employer asserts that the imposition of the Final Rule in the instant matter materially affected the outcome of the election and, therefore, a new election should be conducted in accordance with the Board's Rules and Regulations as they existed prior to the effective date of the Final Rule. Specifically, the Employer asserts the following:

- (1) that the imposition of the Final Rule unlawfully compelled the Employer to violate the personal privacy rights of its employees by forcing the disclosure of employees' personal e-mail addresses and phone numbers to the Petitioner;
- (2) that the imposition of the Final Rule unlawfully compelled an election timeframe that interfered with the Employer's rights under Section 8(c) of the Act because the Employer and its representatives did not have an adequate opportunity to exercise its right to free speech in the artificially compressed timeframe imposed by the Final Rule;
- (3) that the imposition of the Final Rule prejudiced bargaining unit employees' Section 7 rights, specifically employees' right to refrain, because employees were not exposed to a full and fair debate on the relative merits of unionization given the Employer's inability to fully exercise its Section 8(c) rights;
- (4) that the imposition of Section 102.69(a) of the Final Rule reducing the time frame for submitting an offer of proof in support of objections from 14 to 7 days after the election

information prior to any determination that a union's petition is sufficient to proceed to an election; (3) violates the Act and the APA by interfering with protected speech during union election campaigns; and (4) is arbitrary and capricious and an abuse of agency discretion within the meaning of the APA.

¹¹ In *Baker DC, LLC v. NLRB*, the Plaintiffs asserted that the Final Rule: (1) exceeds the Board's authority delegated by Congress by imposing unprecedented disclosure requirements on Employers, including compelling disclosure of confidential, personal and private information regarding their employees; (2) impermissibly restricts employers' right to present evidence on questions concerning representation at an appropriate hearing, including issues of voter eligibility or inclusion in the bargaining unit and the requirement that employers file a written statement of position upon preclusion; (3) violates employers' first amendment and statutory rights of free speech; and (4) is arbitrary and capricious.

Durham School Services, L. P.
Case 32-RC-150090

“prevented the Employer from having the requisite time to properly prepare its Objections to be presented in front of the Hearing Officer” and to present its evidence in support thereof.

DISCUSSION

The Final Rule went into effect on April 14, 2015, and I am bound to apply it. Despite the Employer’s contentions to the contrary, the Final Rule is lawful. Congress delegated both general and specific rulemaking authority to the Board. Generally, Section 6 of the Act, 29 U.S.C. 156, provides that the Board “shall have authority from time to time to make, amend, and rescind in the manner prescribed by the Administrative Procedure Act * * * such rules and regulations may be necessary to carry out the provisions of this Act.” In addition, Section 9(c), 29 U.S.C. 159(c)(1), specifically contemplates rules concerning representation case procedures, stating that elections will be held “in accordance with such regulations as may be prescribed by the Board.” As the Supreme Court unanimously held in *American Hospital Association*, 499 U.S. 606, 609-10 (1991), the Act authorizes the Board to adopt both substantive and procedural rules governing representation case proceedings.

As for the Employer’s general objections to the Final Rule, including those articulated in the district court documents that were incorporated by reference, all of these objections were fully answered in the Board’s justification for the Final Rule, as set forth in the Federal Register. See Representation—Case Procedures, 79 Fed. Reg. 74,308 (Dec. 15, 2014). Further, in the only Federal district court decision to date substantively addressing a challenge to the validity of the Final Rule, the Final Rule was upheld. See *Associated Builders & Contractors of Texas, Inc. v. NLRB*, No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015).

It is well settled that “[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000) (internal citations omitted). Therefore, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (internal citation omitted). To set aside an election based on Board agent misconduct or Regional office procedural irregularities, the objecting party must show that there is evidence that “raises a reasonable doubt as to the fairness and validity of the election.” *Durham School Servs., LP*, 360 NLRB No. 108, slip op. at 4 (May 9, 2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970).

For the reasons set forth below, the Employer failed to meet its burden to have the election set aside and also failed to proffer evidence that raises a reasonable doubt as to the fairness and validity of the election.

- (1) The Final Rule did not unlawfully compel the Employer to violate the personal privacy rights of its employees.

The Employer contends that the Final Rule’s requirement to disclose employees’ personal contact information unlawfully compelled it to violate the personal privacy rights of its

Durham School Services, L. P.
Case 32-RC-150090

employees by forcing the disclosure of employees' personal e-mail addresses and phone numbers.

The Board, however, squarely addressed these employee privacy concerns in the Federal Register. 79 Fed. Reg. 74,341 – 74,351. After a lengthy discussion about the concerns regarding employees' privacy rights, the Board concluded that the substantial public interests in the fair and free choice of bargaining representatives and in the expeditious resolution of questions of representation outweigh the interests that employees and employers have in keeping the information private. Specifically, the Board reasoned that the new requirements facilitate an informed electorate and an expeditious resolution of questions or representation. In the Board's view, the new requirements help to minimize any invasion of employee privacy caused by disclosure of the information because the disclosure of information is limited in a number of key respects; the information itself is limited in scope; and it is available only to a limited group of recipients, to use for limited purposes. See also *Associated Builders & Contractors of Texas, Inc. v. NLRB*, No. 1-15-CV-026 RP, 2015 WL 3609116, at *11 (W.D. Tex. June 1, 2015) (concluding that the Plaintiffs' challenge to the Final Rule on the ground that it improperly invaded employee privacy failed).

Accordingly, I reject the Employer's contention that I should overturn the results of this election and order that a new election be conducted on the basis of employee privacy concerns.

(2) The Final Rule did not unlawfully compel an election timeframe that interfered with the Employer's rights under Section 8(c) of the Act.

Despite the fact that the Employer agreed to the date of the election in the Stipulated Election Agreement that was signed by both parties and approved by me on April 20, 2015, the Employer now contends that the election timeframe under the Final Rule is unlawful because it interferes with its rights under Section 8(c) of the Act because the Employer and its representatives did not have an adequate opportunity to exercise its right to free speech in the artificially compressed timeframe imposed by the Final Rule.

Again, the Board specifically addressed these concerns in the Federal Register. 79 Fed. Reg. 74,318 – 74,326. As an initial matter, the Board concluded that the Final Rule is not inconsistent with Section 8(c) of the Act and the First Amendment. Section 8(c) of the Act provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. 158(c). On its face, Section 8(c)'s stated purpose is to prevent speech from "constitut[ing] or be[ing] evidence of an unfair labor practice." Accordingly, the Board has repeatedly held that Section 8(c) applies only in unfair labor practice and not in representation proceedings. See, e.g., *Hahn Prop. Mgmt. Corp.*, 263 NLRB 586, 586 (1982); *Rosewood Mfg. Co., Inc.*, 263 NLRB 420, 420 (1982); *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782, 1787 fn. 11

Durham School Services, L. P.
Case 32-RC-150090

(1962). Accordingly, because the Final Rule, which addresses representation case procedures, does not in any way permit the Board to use speech or its dissemination as evidence of an unfair labor practice, the literal language of Section 8(c) is not implicated. 79 Fed. Reg. 74,318 – 74,319.

Further, the Final Rule does not run afoul of the First Amendment; it does not impose any restriction on the speech of any party. As the Board explained in the Federal Register, the Final Rule does not eliminate the opportunity for the parties to campaign before an election, nor does it impose any restrictions on campaign speech. As under the previous rules, employers remain free to express their views on unionization, both before and after the petition is filed, so long as they refrain from threats, coercion, or objectionable interference. As the Supreme Court stated in 1941, “The employer . . . is as free now as ever to take any side it may choose on this controversial issue.” *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941). Likewise, the Final Rule does not impose any new limitations on union speech. Accordingly, the Board's effort to simplify and streamline the representation case process does not infringe the speech rights of any party. See also *Associated Builders & Contractors of Texas, Inc. v. N.L.R.B.*, No. 1-15-CV-026 RP, 2015 WL 3609116 at *13 (W.D. Tex. June 1, 2015) (concluding that Plaintiffs' challenge to the Final Rule on the basis of impairment of free speech failed as they did not demonstrate the Final Rule impermissibly burdened speech). As highlighted by the Board, Employers will continue to have ample meaningful opportunities to express their views both before and after a petition is filed.

Accordingly, I reject the Employer's contention that I should overturn the results of this election and order that a new election be conducted on this basis.

(3) The Final Rule did not prejudice bargaining unit employees' Section 7 rights.

The Employer contends that the imposition of the Final Rule prejudiced bargaining unit employees' Section 7 rights, specifically employees' right to refrain, because employees were not exposed to a full and fair debate on the relative merits of unionization given the Employer's inability to fully exercise its Section 8(c) rights. As outlined above, and explained in more detail by the Board in the Federal Register, the Final Rule does not violate the Employer's Section 8(c) rights and it does not prejudice employees' Section 7 rights. 79 Fed. Reg. 74,318 – 74,326. As set forth by the Board, the Final Rule accords with the statutory policy in favor of free debate.

Accordingly, I reject the Employer's contention that I should overturn the results of this election and order that a new election be conducted on this basis.

(4) The reduced time frame for filing the Employer's Offer of Proof in support of its Objections as set forth in the Final Rule did not prejudice the Employer's ability to present its evidence

Finally, the Employer argues, without any details or facts to support it, that the portion of the Final Rule which reduced the time frame for submitting its offer of proof in support of objections prejudiced its ability to obtain and present its evidence. The election in this case was held on May 8, 2015. Under the Final Rule, the Employer's objections and offer of proof were

Durham School Services, L. P.
Case 32-RC-150090

due on May 15. The Employer timely submitted both documents. Under the terms of the Final Rule, just as in the Board's previous procedures, the objecting party need only set forth a short statement of the reasons for each objection accompanied by an offer of proof identifying each witness the party would call to testify concerning the issue and summarizing the witness's expected testimony. Further, the Final Rule provides that the Regional Director may extend the time for filing of the offer of proof upon showing of good cause.

As a threshold matter, I note that the Employer did not submit a request for an extension of time to file its offer of proof in this matter. Moreover, it did not make any arguments at the hearing to the effect that its ability to present witnesses and other evidence was prejudiced by the fact that its offer of proof was due on May 15, as opposed to May 22, the date that the offer of proof would have been due under the old rules. Finally, I note that the hearing on the objections lasted for five days, during which the Employer presented the testimony of eleven witnesses, including witnesses Dorton, Sandra Wilson, Rodney Smith, Stev Bender, Penny Reinholds, and Ina Door, who were not even identified as potential witnesses in the Employer's offer of proof. In an election in a small unit like this one where there were only seven eligible voters, absent any concrete evidence of prejudice as a result of the reduced timeframe for submitting the offer of proof, the Employer's argument in this regard rings hollow. Accordingly, I reject the Employer's contention that this constitutes a basis for overturning the results of the election.

In summary, based upon the entire record in this matter and in accordance with my conclusions detailed above, I adopt the recommendations of the hearing officer. I hereby overrule Objections 1, 2, 3, and 4 and the Employer's additional "Final Rule" objection in their entirety, and I shall certify the results of the election.

II. CONCLUSION

Based on the above and having carefully reviewed the entire record, the hearing officer's report and recommendations, and the exceptions and arguments made by the Employer, I overrule the objections and the Employer's exceptions, and I shall certify the Petitioner as the representative of the appropriate bargaining unit.

III. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for Teamsters Local 853, International brotherhood of Teamsters, Change to Win, and that it is the exclusive representative of all the employees in the following bargaining unit:

All full-time and regular part-time routers, payroll department employees, administrative employees, and dispatchers employed by the Employer at its facilities located at 27577 Industrial Boulevard, Suite A; Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California; excluding employees represented by a labor organization, professional employees, confidential employees, managers, guards, and supervisors as defined by the Act.

Durham School Services, L. P.
Case 32-RC-150090

IV. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by August 12, 2015. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

DATED: July 29, 2015


GEORGE VELASTEGUI

Regional Director
National Labor Relations Board Region 32
1301 Clay Street Ste. 300 N
Oakland, CA 94612-52244

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

In the Matter of:)	
)	
DURHAM SCHOOL SERVICES, L.P.,)	
)	
Employer,)	
)	
and)	Case No. 32-RC-150090
)	
TEAMSTERS LOCAL 853,)	
INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS, CHANGE TO WIN,)	
)	
Petitioner.)	

**EMPLOYER DURHAM SCHOOL SERVICES, L.P.'S
REQUEST FOR REVIEW OF THE ACTING REGIONAL DIRECTOR'S DECISION
OVERRULLING EMPLOYER'S OBJECTIONS TO THE ELECTION**

McMAHON BERGER, P.C.

Geoffrey M. Gilbert, Jr.
Dean Kpere-Daibo
2730 North Ballas Road, Suite 200
St. Louis, Missouri 63131
(314) 567-7350
(314) 567-5968 (facsimile)

**Attorneys for Employer
Durham School Services, L.P.**

OF COUNSEL:

**McMahon Berger, P.C.
2730 North Ballas Road, Suite 200
St. Louis, Missouri 63131**

TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND	2
II. STATEMENT OF THE ISSUES	4
III. STATEMENT OF FACTS	5
A. Employer's Hayward Operation	5
B. Lead Dispatcher Michelle Dorton.....	6
C. Dorton's Supervisory Responsibilities	7
D. Dorton Assisted In Scheduling And Communicating The Union Meetings To The Eligible Voters And Solicited Union Authorization Cards.	14
E. During The Eligible Voters' First Meeting With The Union, Dorton Threatened The Eligible Voters In Order To Obtain Their Signatures On Union Authorization Cards	15
F. The Union Failed To Reject And/Or Repudiate An Employee's Injection Of Race Into The Employer's Reasoning For Challenging The Ballots Of Dorton And Corley	16
G. The Union Fabricated Evidence And Refused To Produce Subpoenaed Evidence During The Objections Hearing	17
1. Bender's Summary of Notes Were Fabricated.....	17
2. The Union Failed And/Or Refused to Appropriately Produce The Signed Receipt From Applebee's	19
3. The Union Refused To Produce A Legible Copy Of Alvelais' Notes	20
4. The Union Failed To Produce Alvelais To Testify.	21
IV. LEGAL ARGUMENT	21
A. Dorton's Supervisory Status.	21
1. The RD Erred In Failing To Determine Whether Dorton Is A Supervisor Of The Drivers Under Section 2(11).....	21
2. The RD Erred In Determining Dorton Is Not a 2(11) Supervisor.....	22
a. Definition Of Supervisor.....	23
b. The RD Ignored Competent Record Evidence In Determining That Head Dispatcher Dorton Is Not A Section 2(11) Supervisor	24
c. The RD Erred in Refusing to Draw an Adverse Inference Relating to the Union's Refusal to Produce a Legible Copy of Alvelais' Notes As Well As Alvelais To Testify	28
3. The RD Erred In Determining That Moncado's Credible Testimony Was Not Sufficient To Establish That Dorton Is A Section 2(11) Supervisor With Respect To The Dispatch Employees.	31

B. The RD Erred by Finding Dorton’s Conduct Was Not Objectionable Supervisory Taint	32
1. Statement Of The Law	32
2. Application Of The Law To The Competent Record Evidence Clearly Establishes The RD Erred By Not Finding Dorton’s Conduct To Be Objectionable Supervisory Taint.	34
a. The RD Erroneously Determined That Dorton’s Conduct Did Not Reasonably Tend To Interfere With The Exercise Of Free Choice In The Election.....	34
i. Nature And Degree Of Supervisory Authority	34
ii. Nature of The Objectionable Conduct	35
3. The RD Erred By Ignoring Controlling Precedent.....	39
C. The RD Erred By Not Finding The Union Either Told Eligible Voters That The Employer Illegally Challenged Dorton And Corley’s Vote Because Of Their Race Or That The Union Failed To Repudiate An Employee’s Statement That The Employer Illegally Challenged Dorton And Corley’s Vote Because Of Their Race.	41
D. The Imposition of The New NLRB Rules and Regulations Violate the Employer’s Rights and Prejudiced The Employer.....	44
V. CONCLUSION	46

TABLE OF AUTHORITIES

Cases

<u>Arlington Masonry Supply, Inc.</u> , 339 NLRB 817 (2003)	23
<u>Assoc. Builders and Contractors of Texas, Inc. v. NLRB</u> , 1:15-cv-00026 (W.D.Tex.2015)	45
<u>Baker DC, LLC v. NLRB</u> , 1:15-cv-00571 (D.D.C.2015).....	45
<u>Beatrice Grocery Products</u> , 287 NLRB 302 (1987).....	43
<u>Chamber of Commerce of the United States v. NLRB</u> , 1:15-cv-00009 (D. D.C.2015)	44
<u>Dean & Deluca New York, Inc.</u> , 338 NLRB 1046, 1047 (2003)	24
<u>Durham School Services, LP</u> , 360 NLRB No. 86 (2014).....	1, 43
<u>El Rancho Market</u> , 235 NLRB 468, 473 (1978).....	32
<u>Glen's Market</u> , 344 NLRB No. 25 (2005).....	4, 22, 39, 40
<u>Harborside Healthcare, Inc.</u> , 343 NLRB 906 (2004)	passim
<u>Juniata Packing Co.</u> , 182 NLRB 934, 935 (1970), <i>enfd. in relevant part</i> 464 F.2d 153 (3d Cir.1972);	32
<u>Lake-Haven Nursing Home</u> , 325 NLRB 250, 251 (1997).....	38
<u>Lone Star Industries</u> , 279 NLRB 550 (1986).....	30
<u>Millard Refrigerated Services, Inc.</u> , 345 NLRB 1143 (2005).....	4, 22, 40, 41
<u>NLRB v. Kentucky River Community Care</u> , 532 U.S. 706, 713 (2001)	23
<u>Orlando Paper Co.</u> , 197 NLRB 380, 387 (1972)	32
<u>Picoma Industries</u> , 296 NLRB 498, 499 (1989)	36
<u>Waldinger Corp.</u> , 331 NLRB No. 544, 545-56 (2000)	32
<u>Waste Management, Inc.</u> , 330 NLRB 634, 634 fn. 22 (2000)	38
<u>Westwood Health Care Center</u> , 330 NLRB 935, 938 (2000)	23
<u>WKRG-TV, Inc.</u> , 197 NLRB 174, 175 (1971); <i>enfd.</i> 470 F.2d 1302 (5 Cir.1973)	32

Statutes

29 U.S.C. § 152(11)	23
---------------------------	----

Rules

<u>Section 2(11)</u>	21, 22, 23, 24
----------------------------	----------------

Regulations

C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74, 439, effective April 14, 2015	45
Sec. 102.69(a)	45

**EMPLOYER DURHAM SCHOOL SERVICES, L.P.'S REQUEST FOR
REVIEW OF THE ACTING REGIONAL DIRECTOR'S DECISION
VERRULLING EMPLOYER'S OBJECTIONS TO THE ELECTION**

Pursuant to the Rules and Regulations of the National Labor Relations Board, particularly Section 102.67, the Employer Durham School Services, L.P., respectfully requests review of the Decision and Directions of the Acting Regional Director ("RD") in this case overruling the Employer's Objections to the Election and certifying the Petitioner as the representative of the appropriate bargaining unit. The request for review should be granted to the Employer for the following reasons:

1. A substantial question of law/policy is raised because of the absence of and departure from officially reported Board precedent that has been decided, but not considered or applied by the Acting RD. Specifically, the RD erred in not properly applying applicable Board precedent set in Harborside Healthcare, Inc., 343 NLRB 906 (2004) and Millard Refrigerated Services, Inc., 345 NLRB 1143 (2005) and improperly relying on an overly broad proposition stated in Glen Market, 344 NLRB No. 25 (2005).
2. A substantial factual issue is clearly erroneous on this record because the Acting RD's decision determined Dorton was not a section 2(11) Supervisor when (a) Dorton has supervisor authority such as the ability to grant employees time off; (b) testimony from Myers, an eligible voter in the instant proceedings, confirmed that Dorton has the authority to grant employees time off; (c) Moncado's testimony regarding Dorton's ability to assign work to her and other employees within the dispatch office, including eligible voter in the instant proceedings, Adela Garcia; (d) Dorton is authorized to give verbal reprimands and counseling to employees; (e) Dorton's ability to direct the work of drivers; (f) Dorton refers to herself as the "Lead Dispatcher"; (g) other managers, supervisors, employees, and the Union unquestionably regarded Dorton as a supervisor.
3. Additionally, the factual issue is clearly erroneous on the record because the Acting RD's decision determined Dorton's statement of "If you want your job, you better sign this card," was not threatening and did not interfere with freedom of choice despite Myers' testimony that the statement was a threat.
4. Lastly, the factual issue is clearly erroneous on the record because the Acting RD's decision determined that race was not referenced in relation to the Employer's decision to challenge ballots.

5. The RD's failure and/or refusal to make an adverse inference against the Union for its failure and/or refusal to produce the signed receipt from Applebee's, a legible copy of Alvelais' notes, and Ms. Alvelais to testify has resulted in prejudicial error.
6. The RD's failure and/or refusal to make an adverse inference against the Union for its production of clearly falsified and/or fabricated notes as evidence during the hearing has resulted in prejudicial error.
7. There are compelling reasons for reconsideration of the NLRB's new rules and regulations as they violated the Employer's procedural due process rights and force the Employer to speak prejudicing the Employer in these proceedings.

I. PROCEDURAL BACKGROUND

On April 14, 2015, the Petitioner, Teamsters Union Local 853 ("Union"), filed a Petition seeking to become the collective bargaining representative of all full-time and regular part-time routers, payroll department employees, office administrators, and dispatchers employed by the Employer at its Hayward, California facility. On May 8, 2015, the Board conducted the election and at the conclusion of the election, the Board determined that 4 votes were cast for the petitioning labor organization and 2 votes were cast against the petitioning labor organization. There was one (1) challenged ballot. The Employer filed four (4) objections to the election results on May 15, 2015, and on May 19, 2015, the RD for Region 32 issued an Order directing the Parties to participate in a hearing for the purpose of taking evidence concerning the Employer's Objections to the Election. Beginning June 2, 2015, the Employer and the Union participated in a hearing before Hearing Officer Jennifer Kaufman ("HO") of Region 32 of the National Labor Relations Board in Oakland, California.

The Employer asserted four (4) objections to the May 8, 2015 secret ballot election: (1) the requisite laboratory conditions for a fair election were not present for the May 8th secret ballot election because the pro-union conduct of Supervisor, Michelle Dorton ("Dorton") reasonably interfered with the eligible voters freedom of choice in the election; (2) the pro-union

conduct of Dorton reasonably tended to interfere with the eligible voters' freedom of choice whether to sign or not to sign a union authorization card; (3) through agents and representatives, the Union coerced and threatened employees with being associated with unlawful activity by the exercise of a possible ballot challenge by the Employer, even though the exercise of such right is both lawful and protected; and (4) through its agents and representatives, coerced and intimidated employees into voting yes by advising employees that the Employer's lawful challenge was going to prevent pro-union employees from having the opportunity to exercise their right to vote.

On July 13, 2015, the HO issued her official HOR incorrectly dismissing the Employer's objections. In the HOR, the HO incorrectly found, among other things, that Dorton did not have supervisory authority over any employees in the designated voting unit. Additionally, the HO incorrectly found that Dorton's coercive solicitation of union cards through the statement, "If you want your job, you better sign this card," did not reasonably tend to interfere with the employees' choice whether to sign an authorization card or vote in favor of the Union. As a result, the HO incorrectly dismissed Employer's Objections 1 and 2. Lastly, the HO incorrectly dismissed Employer's Objections 3 and 4 because the HO incorrectly found that race or racist motivations were not interjected into the election regarding the Employer's ballot challenges of Dorton and Darlene Corely ("Corely").

On July 14, 2015, the Employer timely filed its Exceptions to the HOR arguing the HO erred in ruling that (1) the Employer failed to prove Dorton was a supervisor pursuant to section 2(11) of the Act; (2) the HO could not take an adverse inference against the Union for fabricated evidence and failure to produce subpoenaed documents and witness testimony; (3) Dorton's pro-union conduct would not have reasonably coerced the free choice of employees who she does

not directly supervise; and (4) the evidence is insufficient to establish that there was any suggestion during the critical period that the Employer's decision to challenge certain ballots was racially motivated.

On July 29, 2015, the Acting RD determined the HO's rulings were free of prejudicial error and affirmed them in their entirety. Accordingly, the Acting RD ruled that all the Employer's objections should be overruled and issued a Certification of Results of Election.

II. STATEMENT OF THE ISSUES

1. Whether the RD erred in determining Dorton is not a 2(11) Supervisor.
2. Whether the RD erred in refusing to determine whether Dorton's supervisory status with regard to the drivers is relevant in determining whether Dorton engaged in objectionable supervisory taint in violation of the Board's precedent set in Harborside Healthcare, Inc., 343 NLRB 906 (2004).
3. Whether the RD erred in failing to take a negative/adverse inference against the Union for its clear fabrication of evidence, refusal to produce subpoenaed documentation, and refusal to supply testimony of a subpoenaed witness.
4. Whether the RD erred finding Dorton's conduct was not objectionable supervisory taint.
5. Whether the RD erred in finding that Dorton's conduct did not reasonably tend to interfere with the exercise of free choice in the election.
6. Whether the RD erred in ignoring Board precedent set in Millard Refrigerated Services, Inc., 345 NLRB 1143 (2005) and solely and improperly relying on Glen Market, 344 NLRB No. 25 (2005), for the blanket proposition that coercive supervisory conduct targeted towards one who is not the supervisor's direct subordinate cannot be objectionable.
7. Whether the RD erred in finding the evidence insufficient to establish that there was any suggestion during the critical period that the Employer's decision to challenge certain ballots was racially motivated.
8. Whether the RD erred in finding the National Labor Relations Board's new rules and regulations did not violate the Employer's rights and prejudice the Employer.

III. STATEMENT OF FACTS

A. Employer's Hayward Operation

At its Hayward, California operation, the Employer, a school bus company, transports children who have special needs, including some who use wheelchairs and other assistive devices, to and from school (TR 17). At the Hayward location, the Employer has a contract with the school districts in Fremont, San Leandro, San Lorenzo, Newark and Hayward, California, to provide these specialized services (TR 17). The Employer has approximately 105 drivers who serve approximately 150 routes at this location (TR 18). The drivers are represented by the Union (TR 18).

In the mornings, the drivers travel to the children's homes to pick them up and then deliver them to the school, typically between 6:30 a.m. and 9:30 a.m. (TR 19). In the afternoon, the drivers pick up the children at the schools and then deliver them to their homes, typically between 12:00 p.m. and 4:00 p.m. (TR 19). There are also mid-day routes that typically begin between 10:00 a.m. and 12:00 p.m. (TR 19).

Ronald Mahler ("Mahler") is the current General Manager of the Employer's Hayward Customer Service Center (TR 377). He has worked in school bus transportation for 46 years and has been in his current position for three (3) years (TR 377). Mahler is the highest ranking management official at the facility, with Sandra Wilson ("Wilson"), Operations Supervisor, Eileen Noonan ("Noonan"), Safety Supervisor, Jeremy Escobar ("Escobar"), Fleet Maintenance Supervisor and Roxanne Liette ("Liette"), Livermore Site Supervisor, reporting directly to him (TR 378).¹ Directly below these individuals is Dorton, Lead Dispatcher (TR 379). Below

¹ The Hayward and Livermore facilities fall under the same contract to provide bus services for the same school districts (TR 378). Livermore is considered a satellite location of the Hayward operation.

Dorton are the other office staff, such as the administrator, dispatcher and routers, and below them are the drivers (TR 384).

B. Lead Dispatcher Michelle Dorton

Dorton has been in the bus industry for 22 years and a dispatcher at the Hayward Service Center for 17 years (TR 23; 24). Dorton's nametag states she is the "Lead Dispatcher" (TR 20).² Dorton typically works from 10:30 a.m. to 7:00 p.m. (TR 22). Additionally, working in the dispatch office at the Hayward facility is Adela Garcia ("Garcia") who is a dispatcher (TR 16).

In general, dispatchers are responsible for coordinating activities between the drivers and to supervise the drivers by making sure they leave the bus yard on time, they pick up the children timely and deliver them to the school safely, and they deliver the children home in the afternoon safely and on time (TR 418). Dispatchers also are responsible for ensuring all routes are covered in the event a driver calls off (TR 418). They must consider various factors in covering routes, such as the computer program Versatrans, the route sheets, and their personal knowledge of the drivers, the routes and children being transported (TR 419). In the event of a vehicle breakdown, the dispatcher is responsible for making sure the children are safe and then transported to the school or their home safely by getting another bus out to the location as quickly as possible (TR 419, 420).

As the Lead Dispatcher, Dorton has a heightened level of responsibility as she must know all of the routes and the condition of the child being transported to make sure the drivers have the proper equipment and vehicle to match the needs of the route (TR 418). Covering routes also is a necessary and important part of her responsibilities because the Employer frequently is short at least one driver (TR 23). To address such a shortage, Dorton can refer to "Versatrans," a

² Paula Moncado ("Moncado"), driver, noted that Dorton has a name badge hanging on her monitor that reads "Michelle Dorton, Lead Dispatcher" (TR 294). Mahler confirmed he too has seen Dorton's name badge that states she is the Lead Dispatcher (TR 383).

program containing all of the various route details, which allows her to identify other drivers' routes to determine whether there is a sufficient enough gap in their route to fill in for the absent driver (TR 23). Another option available to Dorton to fill the route is to call out over the radio to ask for volunteers to take the route (TR 23-24). However, primarily Dorton will rely on her memory of which drivers are on which route to determine if drivers are available to assist with the route (TR 26). In such a situation, Dorton could contact the driver and determine if he/she was available to help on a particular route or a particular pick up (TR 27). If the Employer fails to cover a route, it is subject to fines referred to as liquated damages to be paid to the school district (TR 235).

In performing her job duties, Dorton uses the Employer's "fleet board," which contains specific information concerning the routes, busses, and drivers in service on a particular day (TR 104-05). Dorton moves busses around the fleet board during the day in the event a driver calls off and she has to cover the driver's route (TR 106).

C. Dorton's Supervisory Responsibilities

One of Dorton's numerous supervisory responsibilities is to approve employee requests for time off. If a driver calls off, then it is Dorton's responsibility to make sure their route is covered (TR 55). If a driver requests time off through completion of a time off slip, the driver can deliver the slip to Dorton, the Operations Supervisor, or the General Manager (TR 57-58). Although Dorton testified at hearing that when a driver presents her with a time off slip, she gives it to the Operations Supervisor, when asked to provide such slips in response to the Union's subpoena for such information, Dorton produced a banker's box full of time slips that she had retained in her possession (TR 62).

Further, the Employer introduced direct evidence of Dorton approving an employee's request for time off through Employer Exhibit 22 (TR 406; EX 22). As shown by this note, the employee, Maria Lopez, a Union representative, requested to take off work on April 6, 2015, and Dorton signed the note at the bottom with her signature (EX 22). Dorton explained that the normal request for time off slip form was not used in this particular situation because the Employer had run out of such slips and had ordered more, but they had not yet been delivered (TR 735).³

With respect to the time off slips entered into evidence at hearing as Employer Exhibit 4, each of them included Dorton's signature (TR 72; EX 4). Dorton confirmed that she was in charge of the time off slips identified in Employer Exhibit 4 (TR 73). The General Manager at the time of the time slips in Employer Exhibit 4 granted her the authority to grant time off as indicated by her signature on the slips themselves (TR 73). Furthermore, it is important to note with respect to the slips identified in Employer Exhibit 4, Mahler discovered these on his own initiative after Dorton had not identified them in response to his request for all of the call off slips (TR 405). Rather, Dorton only directed Mahler to a box underneath the counter containing what turned out to be only some of the slips in her possession (TR 405). Later that evening Mahler returned to Dorton's work area and discovered the additional request for time off slips that Dorton had not previously produced or identified (TR 411; EX 4). Notably, the slips Mahler discovered on his own that evening were different than the slips produced by Dorton in that the newly discovered slips had Dorton's signature on the approval line (TR 411-12; EX 4).

³ Although Dorton tried to explain away her signature on the note, her explanation is not credible as established on cross-examination. Specifically, Dorton could not articulate a credible justification for her position that her signature on the note was not an approval of the employee's request for leave. Rather, she maintained, incredibly, that she merely was indicating that she had received the document, even though she did not routinely do so for other employee requests for time off. Clearly, Dorton approved this employee's request for time off, as she has done repeatedly during her tenure as the Lead Dispatcher.

Dorton admitted at hearing that if she approved a request for time off, the employee would not be assessed an attendance point under the Employer's attendance policy (TR 123). Dorton would have considered the reason for the requested time off, the number of other drivers that were out at the time, and the type of route involved in making her decision to approve the time off (TR 124). In addition, if the driver calling off drove a wheelchair bus, then Dorton would need to consider this factor in determining who could replace the driver (TR 124).

On occasion, Dorton has had to fill a driver's route based on the information contained on the time off slip received from the driver prior to the point in time when the request for time off actually had been approved (TR 76). Also, Dorton would have to cover a driver's mid-day route without Wilson's signature or verbal permission on the request for time off slip so long as that driver was performing another mid-day route (TR 94). In 2015, in fact, Dorton has had to cover a driver's shift without a signed request for time off slip (TR 90-91).⁴

Pursuant to the Employer's attendance policy, if an employee asks for time off in advance, it will not be recorded as an occurrence on their record, but if an employee calls off work the day of the absence, or takes off work even though his/her request was denied, then it will be counted as an occurrence (TR 143; EX 13).⁵ Dorton maintains a daily list of employees who take off without permission (TR 95). She then reports this information to Wilson (TR 98). Wilson relies on the dispatchers to determine who has called off on a particular day (TR 145). In fact, Wilson has disciplined drivers based on such information (EX 23; TR 238-39).

⁴ Dorton's confirmation of this fact contradicted her earlier hearing testimony wherein she claimed she never covered a driver's shift unless she had assigned copy of a request for time off slip (TR 91).

⁵ Pursuant to the attendance policy, after a third occurrence, the employee receives a verbal coaching; after the sixth occurrence, the employee receives a written warning; after the ninth occurrence, the employee is subject to termination (TR 236).

It is without dispute that only Dorton, Wilson, and Mahler, are authorized to accept requests for time off slips from drivers (TR 156). Further, only Dorton, along with Mahler and Wilson, are authorized to grant time off to drivers who make such requests (TR 145-46). Shirley Myers ("Myers"), Administrator for the Hayward facility and eligible voter in the instant proceedings, also confirmed that Dorton has the authority to grant employees time off (TR 586).

Wilson has a specific procedure she follows when approving or denying a request for time off, which includes making certain notations on the request itself (TR 259: EX 25 and 26). Wilson does not verbally approve requests for time off, but does so in writing by signing the request for time off slip (TR 146). The Employer presented a significant number of examples at hearing of requests that were approved or denied that did not contain Wilson's specific notations, establishing someone other than Wilson approved or denied the request. For example, Wilson did not sign EX 5 and, thus, did not approve that particular request for time off, even though the employee did not work the p.m. route and the employee's request for time off was granted (TR 147-48). Similarly, EX 6 is not signed by Wilson and she did not approve this request for time off, even though the employee's request was granted (TR 151). Another example is EX 14, where Wilson did not approve the request for time off, but the employee did not work the shift in question and was not assessed a point under the attendance policy, meaning the employee received approval for the absence (TR 156). *See also*, EX 15 (employee Pagan); EX 16 (employee Samnang); EX 17 (employee Perez); EX 18 (employee Jackson); EX 19 (employee Washington); EX 20 (employee Davis); EX 21 (employees Ruiz, Jones, and numerous others included within EX 21), which establish these employees were authorized to be absent.

Wilson did not see any of these requests, did not sign any of them, and no attendance points were assessed for the missed time, but they were approved for time off from work during

the shift worked by Dorton (TR 160; 234; 235). Each of these employees were approved to take off time from either their mid-day or p.m. routes, and the shift was covered by Dorton as the Lead Dispatcher. Wilson never told Dorton she did not have authority to approve time requests (TR 160). Mahler confirmed the foregoing practice was an accurate description of determining whether an employee would have received approval for a time off request (TR 389). Mahler also confirmed that he would not have approved any of the requests for time off presented as examples at hearing that did not have his signature (TR 390).

Had the employees referenced in the Exhibits introduced at hearing not been given approval to take the time off as requested, then an attendance point would have been assessed to the employee's attendance record (TR 230). As shown in the Exhibits, however, no attendance points were assessed, meaning the requests for time off were approved. Moreover, driver Penny Reynolds ("Reynolds") confirmed at hearing that there were times where her request for time off was approved without a written signature, meaning Dorton approved it (TR 523). Further, when needing to take time off, Moncado, driver, testified that she requests a time off slip from Dorton, completes the slip, and then returns it to Dorton (TR 294; 295).

Mahler confirmed that only he, Wilson, and Dorton are authorized to receive request for time off slips from drivers and, accordingly, these are the only three individuals authorized to approve requests for time off (TR 388). If Mahler were to receive the request for time off, he would ask Dorton if she could cover the route in the driver's absence, and if she could, then he would approve the request (TR 388-89). Just as Wilson, Mahler does not verbally approve requests for time off (TR 389).

Further evidence of Dorton's supervisory authority to grant time off is demonstrated by the following incidents. On one occasion, a driver (Stephanie Ibanez) got into an accident on her

way home after work. The next morning, Mahler asked to speak with the driver to obtain her version of the events surrounding her accident (TR 412). Wilson informed Mahler that the driver was not there that day because Dorton had given her that day and the next day off (TR 412-13). On another occasion, Ina Lynn Door ("Door"), a driver, received approval from Dorton to take time off for surgery she needed to have (TR 558).

As for the assignment of work by Dorton as the Lead Dispatcher, if a driver delivers a child to his/her home and a parent or other responsible party is not there to receive the child, then the driver is instructed to contact Dorton for further instruction (TR 118). Dorton will work with the school district to determine the best course of action to take with respect to what to do with the child until the adult is located (TR 118). Examples of decisions made by Dorton in this situation include sending another bus out to pick up the child or having the driver bring the child back to the bus yard (TR 120).

Wilson rarely becomes involved in the process of covering routes; that responsibility falls solely on Dorton's shoulders (TR 250). Wilson has heard Dorton inform a driver (Mark Hobson) that he had to cover a route due to another driver (Donna Jackson) having a conflict (TR 250). As a result, Mr. Hobson covered the route (TR 250).

Moncado is a driver who was placed on light duty in the dispatch office for approximately four months in 2015 as a result of an injury (TR 290-91). At the beginning of the assignment, Wilson instructed Moncado that she was to take her orders from Dorton and to get approval from Dorton if she had to leave early (TR 301). Moncado asked Dorton what needed to be done while she worked in the dispatch office (TR 298). Dorton provided Moncado with her work assignments while she worked in the dispatch office, such as giving her a route sheet with parents' contact information that Moncado was required to call, having her answer the phones,

calling out information on the radio, obtaining documents from the printer, and other various assignments (TR 299).

Moncado believed Dorton was her supervisor during the time she worked in the dispatch office (TR 300). Moncado based her belief in this regard on all of the directions she had given her and that she could not refuse Dorton's directions (TR 311). Eligible voter Myers confirmed that Dorton directs the work of others, including Garcia, another dispatcher, by, among other things, telling her to make sure the buses are in the yard, directing her to contact the parents when necessary, and ordering her to make sure the binder is properly completed (TR 590-91).

Further, Dorton counsels other employees in dispatch on their job performance, such as proper phone technique or communications with drivers (TR 252). In handling complaints from angry or upset parents about a transportation issue, Dorton rarely consults with Wilson about such conversations, while the other dispatcher, Garcia, does consult with Wilson (TR 253).

Dorton is authorized to give verbal counseling to drivers (TR 414). On more than one occasion, Dorton has questioned a driver about their decision to pick up a second child in a reverse order which resulted in the bus being late (TR 414). Dorton also has questioned drivers about them forgetting a child (TR 414). Each of these behaviors can result in liquidated damages being assessed against the Employer (TR 414).

Further evidence of Dorton's supervisory status with respect to counseling and correcting inappropriate behavior is shown through an event that occurred in April 2015 involving Moncado and another employee named Sharon (TR 300). Specifically, during a brief down period when the activity in the dispatch office was relatively slow, Moncado and Sharon were discussing various topics among themselves when Dorton stated, in a loud voice, "Excuse me, are you two still on the clock?" (TR 300). When they stated they were, Dorton stated, "Then I

expect you should be working” (TR 301). After being admonished by Dorton, her supervisor, Moncado returned to work (TR 301).

Dorton also criticized Moncado’s work performance while she was in dispatch, telling her she needed to figure out an issue on her own; in essence, Moncado believed she was receiving a verbal counseling (TR 302). On another occasion, Dorton’s attitude toward Moncado was so inappropriate that she filed a grievance with her Union, during which she told her Union representative that Dorton was the head dispatcher (TR 304; 310). An incident report was prepared on this issue (TR 400-01; EX 31).

D. Dorton Assisted In Scheduling And Communicating The Union Meetings To The Eligible Voters And Solicited Union Authorization Cards.

Prior to the Friday, May 8, 2015 secret ballot election, Dorton was the primary contact with Union Organizer, Rodney Smith (“Smith”), in the Union’s attempt to organize the eligible voters (EX 2). As Employer Exhibit 2 clearly indicates, Dorton communicated with Smith directly regarding the filing of the Petition as well as the setting up of Union meetings with the eligible voters. In fact, testimony presented at hearing established that Dorton set up and ultimately communicated to the eligible voters when the eligible voters were going to have a meeting (TR 581; 620).

Myers specifically testified that she was made aware of the Union meeting by Dorton when Dorton pulled her aside and informed her that the members of the administrative staff were joining the Union and were going to have a meeting (TR 581). Dorton proceeded by instructing Myers that the Union meeting was very important and that they all needed to attend (TR 581). At hearing, Candace Comandao (“Comandao”) also testified that she was informed by Dorton of when the Union meeting would take place (TR 620). Comandao further testified that Dorton

called her on the phone and informed her of the meeting, the time, and the location (TR 620).

Finally, Comandao testified that Dorton told her to attend the union meeting (TR 620).

Dorton assisted the Union by attempting to secure authorization cards signed by eligible voters on behalf of the Union. (TR 41). She specifically testified and admitted that Union authorization cards were delivered to her and that she approached other eligible voters and asked them if they wanted the authorization cards. (TR 41-42). Dorton also testified that after she distributed union authorization cards to eligible employees, the employees brought the authorization cards back to her. (TR 43). After the cards were returned to Dorton, she delivered them to an undisclosed driver, whom she refused to identify during the hearing. (TR 43). In fact, Myers specifically testified that Dorton approached and offered her a union authorization card; however, Myers testified that she never took an authorization card from Dorton. (TR 583).

E. During The Eligible Voters' First Meeting With The Union, Dorton Threatened The Eligible Voters In Order To Obtain Their Signatures On Union Authorization Cards.

In April of 2015, the eligible voters, including Dorton, attended a meeting with the Union at a restaurant named TOGO's in Hayward, California (TR: 583). Present during this meeting with the Union was Garcia, Router Sherry Head ("Head"), Comandao, Corley, Myers, and Dorton (TR 596). During this meeting, Union authorization cards were passed out for the employees to sign. In order to obtain the signatures of all the employees, including the signature of her subordinate, Garcia, Dorton stated to the entire group of employees, "**If you want your job, you better sign this card**" (TR 610). At hearing, Myers expressly testified that Dorton made this statement during the meeting with the Union in order to get all eligible employees to sign a union authorization card (TR 600; 610). Additionally, Myers specifically testified the

statement was a threat and that it was made to the entire group of eligible employees who attended the Union meeting at TOGO's (TR 600; 610)⁶.

F. The Union Failed To Reject And/Or Repudiate An Employee's Injection Of Race Into The Employer's Reasoning For Challenging The Ballots Of Dorton And Corley.

The night before the secret ballot election, on May 7, 2015, several of the eligible employees were informed by the Union that the Employer had challenged the voting eligibility of Dorton and Corley (TR 339-342; 616). During a telephone conversation with Smith, someone indicated that the Employer was challenging Dorton and Corley's vote because of their race (TR 340-343). At hearing, Smith did not deny that race was discussed. Instead, Smith testified during hearing that when such statements are made he merely brushes those types of things off (TR 342). Thus, instead of rejecting or repudiating such statements, Smith merely brushed this statement off.

Subsequently, Comandao was in the dispatch room when she overheard a phone call with Dorton and Head where they informed Comandao that the Employer was challenging the votes of Dorton and Corley (TR 616). During this conversation, the employees became very upset because they could not understand why the Company could essentially not "allow" someone to vote (TR 618). In fact, Comandao became so upset by the Employer challenging the votes of Dorton and Corley that she changed her vote from a no to a yes (TR 616).

⁶ In the RD's Decision, the RD improperly concluded that Dorton's statement was not threatening, despite Myer's direct testimony stating that she took the statement as a threat. (TR 600; 610). The RD's decision to completely ignore direct testimony from Myers regarding this issue was improper and directly led to the incorrect decision that Dorton's statement did not reasonably tend to interfere with the employees' freedom of choice whether to sign an authorization card or vote in favor of the Union. (See RD's Decision).

G. The Union Fabricated Evidence And Refused To Produce Subpoenaed Evidence During The Objections Hearing.

1. Bender's Summary of Notes Were Fabricated.

At hearing, the Employer introduced a summary of a union meeting drafted by Steve Bender ("Bender"), Union organizer, into evidence (EX-27). The competent record evidence irrefutably establishes that Bender's summary is a fabricated document created after the fact and solely to provide the Union with a defense to the Employer's objection regarding challenged ballots.

In support of its position in this respect, the Employer asserts at hearing both Bender and Smith testified that the first time they learned the Employer intended to challenge the votes of Corley and Dorton was when the Union received the voter eligibility list from the Employer on April 22, 2015 (TR 353, 468-469). The summary, however, is dated April 21, 2015 – one day prior to the date the Employer sent the voter eligibility list to the Union. It would have been impossible for the Employer's intention to challenge Corley and Dorton's votes to have been raised at a meeting on April 21, 2015 and the only logical explanation for the summary is that it was created out of whole cloth by the Union to assist in the Union's defense of the Employer's objections.

At hearing, Bender attempted to address the problem created by the fact that the summary referencing a discussion of the Employer challenging Dorton's ballot is dated prior to the time the Employer indicated it intended to challenge Dorton's ballot by testifying that his notes were incorrectly dated (TR 461, 463-465, 492-493). According to Bender, the Union meeting referenced in the summary took place on April 30, 2015 and the summary should have reflected that date. This explanation by Bender, however, even if true, does not establish that EX-27 is anything more than a fabricated document. In this respect, even if the summary pertains to a

meeting conducted on April 30, 2015, the following irrefutably proves that the summary was fabricated:

- Bender testified that he rewrites his initial notes to ensure accuracy, correct spelling errors and correct grammatical errors (TR 461, 463-465, 492-493). Bender also testified that prior to producing EX-27 in response to the Employer's subpoena he noticed that the date on the document was incorrect (TR 476-478). Despite Bender's practice of rewriting his notes to ensure accuracy, Bender submitted his summary with an incorrect date (TR 478). In addition, the summary is replete with misspelled words and grammatical errors (EX-27; TR 463-464).
- Smith testified that after Union meetings, he debriefs with Bender (TR 330). Smith also testified that he called Dorton and other eligible voters 2 or 3 days before the election to tell Dorton her vote was going to be challenged (TR 336-342, 352-353). If the issue of the challenged ballots had been brought up during the April 30, 2015 meeting as Bender claimed, Bender would have told Smith about his conversation with the eligible voters regarding the challenged ballots and Smith would have had no reason to call Dorton and discuss the issue.
- Dorton, Myers and Candy all testified that the Employer's intention to challenge Dorton and Corley's votes was never discussed at the Union meeting conducted by Bender (TR 586-587, 615-616, 749-754).
- If the issue of challenged ballots had been raised by the eligible voters at the April 30, 2015 Union meeting as Bender claims, it defies common sense to believe that the eligible voters would have only discussed Dorton and not Corley. Bender's summary, however, only refers to Dorton (EX-27; TR 503, 506).
- Dorton, Myers and Corley all testified the first time they learned that the Employer intended to challenge Dorton and Corley's votes was either the night before or the morning of the election (TR 586-587, 615-616, 749-754).
- Bender testified that he rewrites his notes into a summary to ensure accuracy and that during the April 30, 2015 meeting he explained the entire challenge process to the eligible voters (TR 471-474). Bender's summary, however, does not reflect any discussion of his lengthy explanation of the challenge process as described at hearing (EX-27).
- Portions of the summary are drafted in the wrong tense (TR 461-463).

While the Region acknowledged that Bender's testimony was not credible and that his re-written notes with a date discrepancy were not credible, the RD failed to come to the one inescapable conclusion that the summary presented at hearing by Mr. Bender and the Union was fabricated evidence designed to give the Union a defense to the fact that the Union adopted the position that the Employer was engaging in illegal conduct by challenging ballots based on race. (See HOR). As a result of the Region's failure to properly determine that Bender's notes were fabricated, the RD improperly failed and/or refused to impose the warranted sanctions of an adverse inference against the Union.

2. The Union Failed And/Or Refused to Appropriately Produce The Signed Receipt From Applebee's.

During hearing, Bender testified the meeting he conducted with the eligible voters took place on April 30, 2015 at Applebee's. In support of his position, Bender submitted an unsigned receipt for a meal at Applebee's dated April 30, 2015. Bender, however, also admitted submitting a signed receipt to the Union regarding dinner at Applebee's and said receipt was requested by the Employer and HO on several occasions. Despite admitting that a signed receipt exists, the Employer's numerous requests for the signed receipt and the HO's numerous requests for the production of the receipt, the Union failed to produce the signed receipt.

However, despite the Unions refusal to produce the receipt pursuant to the Employer's subpoena and the HO's direct demands during the hearing, the RD failed and/or refused to appropriately draw an adverse inference sanction against the Union relating to its refusal to produce the signed receipt. In fact, despite the Employer's request for the RD to draw such adverse inference, the RD failed and/or refused to even address the issue in the RD's Decision and certification of representation.

3. **The Union Refused To Produce A Legible Copy Of Alvelais' Notes.**

In response to the Employer's Subpoena, the Union produced an illegible copy of Stacey Alvelais' ("Alvelais") notes referencing Dorton's conduct at work. These illegible notes were admitted into evidence as EX 35. During the hearing, both Counsel for the Employer and the HO made numerous requests for the Union to produce a legible copy of Alvelais' notes. Counsel for the Employer even agreed to accept a picture of the legible notes sent via a smartphone. Initially, the Union claimed that a legible copy of the notes had been misplaced in Alvelais' office. On the fourth day of hearing, Counsel for the Union stated that a legible copy of the notes still had not been located but that she was willing to make an offer of proof as to the contents of the notes. Upon realizing the absurdity of her position, Counsel took the position that a legible copy of the notes had been located at Alvelais' house but that the Union still did not have a copy to produce. At the time the hearing concluded for the week on Friday, June 5, 2015 the Union still had not produced a legible copy of the notes. The hearing was scheduled to reconvene on Tuesday, June 9, 2015. At the time the hearing reconvened the Union, despite having three days to secure a copy or even a picture of the legible notes, still refused to produce a legible copy of the notes.

Again, despite the Employer's subpoena requesting said document, numerous demands by the HO to produce said document and the Union's continued refusal to produce the document, the RD erroneously refused to draw an adverse inference against the Union relating to the document and its relevance to Dorton's 2(11) supervisory status with respect to the dispatch employee, including Garcia.

4. The Union Failed To Produce Alvelais To Testify.

In addition to failing to produce a legible copy of Alvelais' notes, the Union refused to comply with the Employer's properly served Subpoena Ad Testificandum to Alvelais. In this respect, the Union initially stated that Alvelais was out of town on business. As the hearing progressed, the Union stated that Alvelais would not be available to testify until Tuesday, June 9, 2015. Ultimately, the hearing was continued until June 9, 2015 but despite the Union's prior representation that Alvelais would be available to testify on said date, the Union refused to produce Alvelais.

Despite the Employer properly serving a Subpoena Ad Testificandum to Alvelais and the Union's continued refusal to produce Alvelais to testify regarding Dorton's 2(11) supervisory status, the RD improperly refused to draw an adverse inference against the Union relating to Alvelais' testimony. In fact, despite the Employer's requests for the RD to draw such an adverse inference, the RD failed and/or refused to even address the issue in his decision and certification of representation.

IV. LEGAL ARGUMENT

A. Dorton's Supervisory Status.

1. The RD Erred In Failing To Determine Whether Dorton Is A Supervisor Of The Drivers Under Section 2(11) Of The Act.

In the RD's Decision, the RD failed and/or refused to determine whether Dorton is a statutory supervisor over the Employer's drivers. Such a refusal was in clear error as the determination of whether Dorton is a 2(11) supervisor over the drivers is relevant and necessary to the RD's determination of whether objectionable supervisory taint under Harborside Healthcare, Inc., 343 NLRB 906 (2004). Specifically, in the RD's decision, he stated that the HO was not obligated to find that Dorton was a supervisor of the drivers because her conduct would

not have been objectionable under Harborside. As will be more fully detailed below, under Harborside, the supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not. Id. In addition, the Board has ruled that the decisions in Harborside and Glen's Market do not stand for the proposition that **coercive supervisory conduct towards an employee who is not the supervisor's direct subordinate cannot be objectionable.** Millard Refrigerated Services, Inc., 345 NLRB 13 (2005). Thus, contrary to the RD's failure to even address whether Dorton is a 2(11) supervisor over the Employer's drivers, such a conclusion is absolutely relevant and the RD was obligated to issue a finding in this respect.

Accordingly, the Board should determine that the RD's refusal to issue a finding as to whether Dorton is a supervisor under Section 2(11) of the Act with respect to the drivers was in error of law and overturn the RD's decision.⁷ Additionally, the Board should require that applicable binding precedent be applied to said finding inasmuch as the Employer maintains that in light of the RD's other findings, application of controlling precedent to a finding that Dorton is a supervisor under Section 2(11) of the Act compels that the election be set aside a new election scheduled.

2. The RD Erred In Determining Dorton Is Not a 2(11) Supervisor.

The RD incorrectly concluded that Dorton was not a "supervisor" as defined by section 2(11) of the Act. In reaching this finding, the RD ignored uncontradicted record testimony and

⁷ Dorton's supervisory status over the drivers is relevant in determining whether Dorton engaged in objectionable supervisory taint in violation of the Board's precedent set in Harborside. The RD cites Millard Refrigerated Services, Inc., 345 NLRB 13 (2005), for the proposition that a supervisor engaged in coercive pro-union conduct does not become non-objectionable just because the supervisory lines are crossed. Yet, in the same breath, the RD refuses to determine whether Dorton is a supervisor over the drivers. Under the RD's own analysis and application of Millard, such a decision is relevant and absolutely necessary because if Dorton is a supervisor over the drivers, her coercive pro-union conduct would in fact be objectionable.

failed to correctly apply controlling precedent. In addition, the RD failed to draw an adverse inference as to Dorton's supervisory status based on the Union's complete disregard for the NLRB and its policies and procedures. Accordingly, the Board should conclude the RD's decision with respect to Dorton's supervisory status was in error.

a. Definition Of Supervisor.

Section 2(11) of the Act defines "supervisor" as:

an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the forgoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). The possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status, as long as the authority is carried out in the interest of the employer and requires the exercise of independent judgment. Arlington Masonry Supply, Inc., 339 NLRB 817 (2003). "Failure to exercise authority does not negate supervisory status because possession rather than exercise of supervisory authority determines supervisory status." Westwood Health Care Center, 330 NLRB 935, 938 (2000). Stated slightly differently, it is the existence of the supervisory power that determines whether the individual is a supervisor under the Act, not whether the individual actually has exercised that power. Arlington Masonry Supply, Inc., 339 NLRB at 818.

Thus, applying the foregoing definition, individuals are supervisors if "(1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is 'held in the interest of the employer.'" NLRB v. Kentucky River Community Care, 532 U.S. 706, 713 (2001). An individual's supervisory status

can be established if the putative supervisor has the authority to either perform a supervisory function or to effectively recommend a supervisory function. The burden of establishing supervisory status rests upon the party seeking to assert the status. Dean & Deluca New York, Inc., 338 NLRB 1046, 1047 (2003).

**b. The RD Ignored Competent Record Evidence In
Determining That Head Dispatcher Dorton Is Not A
Section 2(11) Supervisor**

In the RD's decision, the RD ignored the following un-contradicted facts regarding Dorton's ability to grant time off⁸ in finding that Dorton is not a supervisor under Section 2 (11) of the Act:

1. Dorton has supervisory authority to, and actually does, approve employee requests for time off. She is one of only three managers/supervisors at the Hayward facility who has the authority to grant employees time off, the other two being Wilson and Mahler.
2. Dorton has signed off on employee-submitted requests for time off on numerous occasions (EX 4).⁹
3. Dorton approved employee requests for time off even when the proper for were not available, such as when an employee provided her with a written note requesting time off (EX 22).
4. Witness testimony during the hearing that they went to Dorton for approval to take time off.
5. Myers, an eligible voter in the instant proceedings, confirmed that Dorton has the authority to grant employees time off (TR 586).
6. Moncado, testified that she requests a time off slip from Dorton, completes the slip, and then returns it to Dorton (TR 294; 295).

⁸ The Employer maintains that a review of the record evidence regarding Dorton's ability to grant time off is necessary in light of the fact that the HO qualified her finding on Dorton being able to grant time off by stating the evidence "tends" to establish said fact.

⁹ The Employer was able to admit such evidence into the record despite Dorton's effort not to reveal the existence of the slips to Mahler when he inquired of her.

7. Dorton authorized employee Ibanez to take off two days from work after she had been involved in an accident (TR 412-13) and authorized Door to take off time for surgery (TR 558).
8. Dorton approved numerous other requests for time off (EX 5, 6, 14, 15, 16, 17, 18, 19, 20, and 21) as evidenced by the fact that she covered routes and did not report the individuals whose routes he covered as absent. Disciplinary action will result if an employee accumulates enough absences to reach the minimum thresholds set forth in the attendance policy.

In addition, the RD ignored the uncontradicted evidence that Dorton assigns work to dispatch employees, including Garcia, as the Head Dispatcher and that Dorton engages in other supervisory conduct regarding dispatch employees. Specifically, the RD ignored the following record evidence:

1. Evidence that Dorton assigned all of the work performed by Moncado while she worked in the dispatch area.
2. Moncado's unrefuted testimony that Dorton granted her permission to leave early for the day to attend doctor's appointments (TR 298-99).
3. Moncado's unrefuted testimony that she could not refuse Dorton's instructions because Dorton was her supervisor (TR 300).
4. Moncado's unrefuted testimony that Dorton gave similar assignments to other dispatchers working in the area, including Garcia. (TR 311).
5. Myers unrefuted testimony that Dorton directed the work of others, including Garcia, by directing Garcia to make sure the buses are in the yard, directing Garcia to contact the parents when necessary, directing Garcia to route bus stops, and ordering her to make sure the binder is properly completed (TR 590-91). Such directions and performance of these directed tasks to Garcia are vital to the function of the Dispatch office and to the overall operations of the Hayward Service Center. The directions to perform dispatcher tasks are such as calling parents regarding their children's safety, transportation services, or behavior are neither minor nor routine. Additionally, directing Garcia to "route the kids" as Myers testified to is also neither a routine nor minor task. The tasks described are vital to the success of the Employer's operation and can only be assigned by the Lead Dispatcher, Dorton. Accordingly, such directions by Dorton to Garcia are neither minor nor routine. (TR 590-591).
6. Evidence that Employees do not question Dorton's directives because she is considered a supervisor. (TR 560).

7. Evidence that Dorton is authorized to give verbal counseling (TR 414).
8. Evidence that Dorton verbally reprimanded Moncado and another employee named Sharon for talking among themselves during work time (TR 300). Dorton asked them, in a loud voice, "Excuse me, are you two still on the clock?" (TR 300). When they stated they were, Dorton stated, "Then I expect you should be working" (TR 301). After being admonished by her supervisor, Moncado returned to work (TR 301).
9. Evidence that Dorton criticized Moncado's work performance on another occasion while she was in dispatch, telling her she needed to figure out an issue on her own; in essence, Moncado believed she was receiving a verbal counseling (TR 302).
10. Moncado's unrefuted testimony at hearing that Dorton was her supervisor while Moncado was working in the dispatch office based on the fact that Dorton directed her in her assignments, gave her verbal demands and directives that were to be followed, and decided whether she could leave for the day to attend doctor appointments which were necessary because of her injury (TR 304).
11. Moncado's unrefuted testimony at hearing that she asked Wilson about taking off work early to attend such appointments and Wilson replied, "Clear it with [Dorton]" (TR 305). In fact, after asking Dorton about leaving early, Dorton would respond either with, "No, you need to stay," or "Yeah, I guess you could leave" (TR 305).

Finally, the RD ignored the following uncontradicted facts/testimony that are relevant to

Dorton's supervisory status:

- 1 Dorton is responsible for covering routes when a driver calls off, which requires her to locate available drivers and direct them to take over routes when practical (TR 250).
- 2 Dorton instructed driver Hobson to cover a route that another driver (Jackson) could not operate due to a conflict (TR 250).
- 3 Dorton also directs drivers to assist with situations where a child's parents are not home to receive the child, which may require the driver to stay with the child or to bring the child back to his/her school or the bus yard to await further instructions from Dorton (TR 118-20).
- 4 Moncado's unrefuted testimony regarding a conversation Dorton had on the phone with a driver during which she informed the driver he had to cover the

route of another driver, stating he could not do “this” to her and could not leave her like that (TR 308).

- 5 Door’s testimony at hearing that she does not question the assignments Dorton gives her (TR 560).
- 6 Dorton questioned a driver about the driver’s decision to pick up a second child in a reverse order which resulted in the bus being late (TR 414). Dorton also questioned drivers about them forgetting a child (TR 414). Each of these behaviors, if not addressed, can result in liquidated damages being assessed against the Employer (TR 414).
- 7 If Dorton is not deemed a supervisor, there would be no representative of management present at the facility on a daily basis between 5:00 p.m. and 7:00 p.m. (TR 242). Varying numbers of drivers are still on the road during these evening hours and incidents occur that require the drivers to contact a member of management for guidance, which would be Dorton since the other members of management are gone by this time (TR 248). For example, the driver’s bus could break down (TR 249), or a parent could call in to discuss a missed route or a child’s needs for the next day, or the school district could call about a missing child (TR 416). Dorton is authorized to speak on behalf of the Employer during these communications (TR 416). Moncado confirmed that if an issue arose after 5:00 p.m., she would call Dorton (TR 313). Mahler testified that Dorton is the only management representative at the facility at that time of the evening (TR 415). In fact, Dorton has the responsibility of locking the facility at night and making sure all employees are out of the building prior to locking and leaving for the night (TR 416).
- 8 Dorton herself views her role as supervisory in nature. (TR 381; 452-53).
- 9 Dorton refers to herself as Lead Dispatcher during staff meetings and during one particular meeting Dorton stated that as the Lead Dispatcher, she should be trained on the computer and have a say on who else would be trained on the computer (TR 381; 452-53).
- 10 Dorton has approached Mahler and asked that her compensation level be increased because she supervises other employees (TR 400). Dorton had a similar conversation with Corina Nelson (“Nelson”), the Employer’s Employee Relations Manager, about her compensation, claiming she should be getting paid more than Garcia because she was directing her work (TR 455).
- 11 Dorton maintains a name badge that expressly states her title is “Lead Dispatcher.” (TR 20).
- 12 Other managers, supervisors and employees of the employer unquestionably regard Dorton as a lead dispatcher and supervisor. Upon her hire, Dorton was

placed into the Lead Dispatcher position (TR 380-81; EX 1). Other members of the staff, including Comandao, refer to Dorton as Lead Dispatcher (TR 615). Drivers refer to Dorton as Lead Dispatcher, including Door, who referred to Dorton as the person to whom she and other drivers reported and from whom she received her work assignments (TR 557).

- 13 Union representatives view Dorton as a supervisor. Specifically, in January 2015, Mahler was involved in a meeting with Union representative Alvelais during which they discussed complaints that Dorton's supervisory skills were creating a hostile work environment among the drivers (TR 397). Specifically, Alvelais was upset with the way Dorton was assigning work to employees and showing favoritism among the employees in her work assignments (TR 398). Alvelais also complained about the tone Dorton used toward some of the employees which was causing the hostile work environment (TR 398). As a result of these concerns, Mahler removed the responsibility of handling the cover drivers from Dorton and gave it to Wilson (TR 398). In addition, Mahler agreed to get Dorton training on improving her supervisory skills (TR 398). Unfortunately, Alvelais did not believe anything changed with respect to Dorton's conduct and she raised the issue again in March/April 2015 during a meeting with Mahler, Nelson and Union representative Alvelais (TR 399). Alvelais warned Mahler that he needed to get "his supervisor," referring to Dorton, under control or the issue would be escalated and the Company possibly could be fined (TR 400; 451).

If the RD had correctly considered the above facts and applied said facts to controlling precedent, the RD would have been compelled to conclude that Dorton was a supervisor as defined under section 2(11) of the Act with respect to both the drivers and the dispatch employees, including Garcia.

c. The RD Erred in Refusing to Draw an Adverse Inference Relating to the Union's Refusal to Produce a Legible Copy of Alvelais' Notes As Well As Alvelais To Testify

The RD erred in failing and/or refusing to draw an adverse inference against the Union relating to the Union's refusal to produce Alvelais and her notes. There is a reason that the Union was so adamant in its refusal to produce a legible copy of Alvelais' notes and its refusal to produce Alvelais to testify – Alvelais' notes and her testimony would have been detrimental to the Union's position that Dorton was not a supervisor. Stated another way, there is no other

logical explanation for the complete lack of professional courtesy and respect for the NLRB that was exhibited by Counsel for the Union other than the Union had something to hide relating to Alvelais' notes and her testimony. Despite the Employer's request that the RD draw an adverse inference that Alvelais' notes and testimony would have established that Dorton was a supervisor as defined under section 2 (11) of the Act with respect to the employees in the dispatch office, including Garcia, the RD erroneously failed to draw such an adverse inference – a decision that essentially rewarded the Union and Counsel for making a mockery of the proceeding. In making this determination, the RD stated the HO correctly came to this conclusion because none of the Employer's witnesses testified at hearing that the subject of the meeting was regarding dispatch employees, it would be inappropriate to draw a negative inference and to effectively discredit the Employer's own witnesses based on the mere fact that the Petitioner failed to produce Alvelais or her notes (*See*, RD's Decision, Page 3).

Initially, the Employer takes issue with the RD putting the burden on the Employer. The Employer participated in the proceeding in good faith and exhibited nothing but respect for the NLRB's procedures and protocol. Yet, according to the RD, compliance with its rules is of no advantage. In fact, the RD's findings indicate the opposite – that contempt for the proceedings of the type exhibited by the Union result in an advantage. If the type of conduct that was exhibited by the Union and its Counsel can simply be dismissed by stating that the Employer did not adduce the very evidence it was precluded from producing, the integrity of the whole process is compromised.

Despite the above argument, the Employer also notes the RD supports his decision to refuse to draw an adverse inference by concluding that doing so would discredit the Employer's own witnesses, which is not accurate. The RD drawing an adverse inference that Alvelais

discussed Dorton's supervisory status and her behavior as a supervisor would not have been contradictory to the Employer's witnesses' testimony. In fact, Ron Mahler, the Employer's General Manager, specifically testified that during a meeting with Alvelais he and members of management discussed Dorton's supervisory skills with Alvelais because Alvelais believed Dorton's behavior created a hostile work environment. (TR 397-99). To further support his erred analysis, the RD cites Lone Star Industries, 279 NLRB 550 (1986), for the proposition that it is unnecessary to draw an adverse inference against a party where a party's own witness gave testimony adverse to the party's interests. However, as previously discussed, this factual analysis does not apply to the matter at hand. Here, the Employer's witnesses testified that Dorton's supervisory status was discussed during the meetings with Alvelais; therefore, drawing an adverse inference against the Union for their refusal to produce Alvelais and her notes would have been the only appropriate remedy for such misconduct. The record evidence also clearly establishes that Moncado filed a grievance with Alvelais regarding Dorton's treatment of Moncado while Moncado was a member of the dispatch staff. As a result, it is beyond question that Alvelais has personal knowledge about Dorton's day to day conduct as the Lead Dispatcher and personal knowledge of Dorton's supervisory status over all of the drivers as well as the dispatch employees, including Garcia.

Additionally, by the Union refusing to produce a legible copy of Alvelais' notes and Alvelais herself, the Union placed the Employer in a unique position in which there were no other witnesses capable of testifying to the Union's position regarding Dorton's supervisory status and her supervisory skills during the meeting at question. Throughout these proceedings, it has been the Employer's position that the Union's refusal to properly comply with the Employer's subpoena and the HO's demands to produce Alvelais and her notes is because such

evidence would have assisted the Employer further establish that Dorton is a 2(11) supervisor. Accordingly, inasmuch as the basis for the RD's refusal to draw an adverse inference is not accurate, the Board should find that the RD erred in not drawing an adverse inference.

3. The RD Erred In Determining That Moncado's Credible Testimony Was Not Sufficient To Establish That Dorton Is A Section 2(11) Supervisor With Respect To The Dispatch Employees.

The RD improperly concluded that Moncado's testimony was not sufficient to establish that Dorton was a supervisor over employees in the dispatch office. Such a conclusion is improper as Moncado testified specifically to Dorton's authority not just over her as a temporary employee within the dispatch office, but she also credibly testified to Dorton's authority over other employees in the dispatch office as well. The RD came to such conclusion by merely dismissing Moncado's credible testimony regarding Dorton's authority over other employees in the dispatch office, despite Moncado working in the dispatch office for several months. For example, the RD erred by ignoring Moncado's credible testimony that Dorton had the ability to verbally counsel not only Moncado, but also other employees who worked in the dispatch office, including Garcia. (TR 300 - 301).

Additionally, the RD incorrectly concluded that Moncado's testimony regarding Dorton's authority over Garcia as her supervisor was not sufficient because Moncado is not a unit employee. Moncado not being a member of the bargaining unit is irrelevant to the analysis to whether Dorton is a 2(11) supervisor who directs the work of Garcia. Moncado testified competently and credibly regarding what she witnessed while she worked in the dispatch office. Moncado was able to directly witness Dorton exercise her supervisor authority over Garcia over an extended period of time (three to four months) (TR 291). Contrary to the RD's contention in his decision, Moncado did not testify to isolated or temporary instances of Dorton exercising her

supervisor authority on Garcia, Becca, and others working in the dispatch office. Instead, Moncado provided credible evidence of Dorton's supervisory status over the employees in the Dispatch office, including Garcia. Accordingly, the Board should find the RD's conclusions are not based on the competent record evidence.

B. The RD Erred by Finding Dorton's Conduct Was Not Objectionable Supervisory Taint.

1. Statement Of The Law

The Board has long recognized that a supervisor's participation in a Union's organizational campaign will taint the Union's card majority where the supervisor's participation may be found to have deprived employees of the opportunity to exercise free choice in selecting a collective bargaining representative. Waldinger Corp., 331 NLRB No. 544, 545-56 (2000); *citing* Juniata Packing Co., 182 NLRB 934, 935 (1970), *enfd. in relevant part* 464 F.2d 153 (3d Cir.1972); El Rancho Market, 235 NLRB 468, 473 (1978). In order to establish that there has been supervisory taint in the solicitation of union authorization cards, the Board has held that the evidence must establish either that the supervisor's activity was such as to have implied to employees that their employer favored the union or **that there is cause for believing the employees were coercively induced to sign the authorization cards because of fear of supervisory retaliation.** *Id.*; *citing* WKRG-TV, Inc., 197 NLRB 174, 175 (1971); *enfd.* 470 F.2d 1302 (5 Cir.1973); Orlando Paper Co., 197 NLRB 380, 387 (1972); El Rancho Market, 235 NLRB 468, 473 (1978).

Additionally, the Board clarified and expanded the legal standard applicable when an employer challenges the results of an election alleging objectionable pro-union conduct in Harborside Healthcare, Inc., 343 N.L.R.B. 906 (2004). Under Harborside, the Board must consider two factors to determine whether supervisory taint has occurred. First, the Board must

consider whether the supervisor's pro-union conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pro-union conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

Second, the Board must consider whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct. Id. According to the Board, "an express promise or threat is not a requirement for finding pro-union supervisory conduct objectionable." Id. Nevertheless, the Harborside inquiry seeks to foreclose conduct-however implicit or subtly framed-that, in the aggregate, pressures employees to support or oppose unions out of fear of retaliation. Id.

Lastly, under Harborside, objectionable conduct includes both "actual threats" and "implied threats of retaliation." Id. However, despite the Board's analysis looking for such actual and implied threats, the Board in Harborside made it clear that such evidence is not a requirement when it stated:

In our view, however, absent mitigating circumstances, supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not. By definition, a supervisor has the power to affect—for good or for ill—the working life of the employee. The solicitation of cards gives the supervisor the opportunity to obtain a graphic illustration of who is pro-union and, by the process of eliminating nonsigners, who likely is not. When a supervisor asks that a card be signed, the employee will reasonably be concerned that the "right" response will be viewed with favor, and a "wrong" response with disfavor.

Id. at 911.

The facts established at hearing in the current proceedings, but improperly rejected by the RD, demonstrate that Dorton made threatening and coercive pro-union statements to the eligible voters, including her subordinate Garcia, to induce the eligible voters to sign union authorization cards. Such evidence clearly constitutes objectionable supervisory taint pursuant to Harborside. In addition, the facts established at hearing, but improperly rejected by the RD, demonstrate that Dorton solicited signatures on Union authorization cards – conduct that, standing alone, constitutes objectionable supervisory taint pursuant to Harborside.

2. Application Of The Law To The Competent Record Evidence Clearly Establishes The RD Erred By Not Finding Dorton's Conduct To Be Objectionable Supervisory Taint.

a. The RD Erroneously Determined That Dorton's Conduct Did Not Reasonably Tend To Interfere With The Exercise Of Free Choice In The Election.

i. Nature And Degree Of Supervisory Authority.

The RD refused to make a finding as to Dorton's supervisory status with respect to the drivers and erroneously determined that Dorton was not a statutory supervisor with respect to the dispatch office employees, including Garcia. Thereafter, the RD determined that Dorton's statement could not be considered a threat of retaliation that reasonably coerced or interfered with employees' free choice in the election because the eligible voters don't report to Dorton.

As established *supra*, under controlling precedent, a determination by the RD as to whether Dorton, as the Lead Dispatcher, is a statutory 2(11) supervisor over the drivers is relevant to the issue of whether Dorton's conduct reasonably tended to interfere with the exercise of free choice in the election. Moreover, even a cursory review of the competent evidence irrefutably establishes Dorton is a statutory supervisor over the drivers inasmuch as she has the authority to direct the work of drivers and dispatch employees, grant and approve time off for

employees, and verbally counsel/reprimand employees. Consequently, the Board must rule the RD erred in this regard and overturn the RD's decision.

In addition, as established *supra*, and contrary to the RD's finding, eligible voters including Garcia do report to Dorton. In fact, Myers, an eligible voter, specifically testified that Dorton was dispatcher Garcia's direct supervisor insofar as she directs Garcia's work and many times verifies whether Garcia has performed the tasks Dorton has directed her to complete (TR 590-91). In addition, Dorton counsels Garcia or anyone performing dispatch duties regarding their job performance (TR 252). As such, the evidence established at hearing demonstrates Dorton is a supervisor pursuant to the Act, and is the direct supervisor of dispatcher and eligible voter, Garcia. Therefore, inasmuch as the RD's determination that Dorton's conduct did not tend to reasonably interfere with the exercise of free choice in the election is based on the RD's erroneous determination that Dorton was not a statutory supervisor over the employees in the dispatch office, including Garcia, the Board must overturn the RD's decision.

ii. Nature of The Objectionable Conduct.

At hearing Myers credibly testified that during a Union meeting Dorton engaged in threatening and coercive conduct intended to induce the eligible voters, including her subordinate, Garcia, to sign a union authorization card. Specifically, in order to obtain the signatures of all the employees, including the signature of dispatcher Garcia, Myers testified that Dorton stated to the entire group of employees, "**If you want your job, you better sign this card**" (TR 610). Finally, **Myers specifically testified at hearing that she understood this statement to be a threat to the group of employees** (TR 600).

Initially, it is imperative to note that under any objective standard a statement like the one made by Dorton is clearly an actual threat of retaliation against the employees, including Garcia,

if they did not sign a union authorization card. This statement is a clear indication that Dorton knew that she wielded the power to affect the employees' working life and was willing to threaten these employees' livelihoods in order to gain support of the Union. The testimony by Myers clearly established the employees who attended the Union meeting understood Dorton's statement as a threat of reprisal and retaliation if they refused to sign the union authorization cards (TR 600). As the Board stated in Harborside, when a supervisor asks that a card be signed, the employee will reasonably be concerned that the "wrong" response will be viewed with disfavor. However, in the instant case, none of the other eligible voters had to wonder whether refusing to sign the union authorization cards would be viewed with disfavor with Dorton. Dorton's statement made it clear that Dorton would use her supervisory power to affect the entire group's working conditions, including her direct subordinate Garcia's working conditions, if the employees at the meeting refused to sign an authorization card.

In the RD's decision, despite finding the above described statement was made by Dorton, the RD ignored Myers credible testimony that she took Dorton's statement as a threat and determined the statement was not threatening in nature. The RD's determination in this respect is erroneous and inconsistent with applicable precedent. In support of this erroneous determination, the RD argues that Myer's subjective reaction to Dorton's statement was not relevant to the analysis. The RD further cites Picoma Industries, 296 NLRB 498, 499 (1989), to support his proposition. The Board in Picoma Industries set aside an election because of threats made by union supporters, which included statements such as, "someone's asses are in trouble if the union did not win," and "there would be trouble if anyone crossed the picket line once the union was selected." Id. The Board in Picoma Industries found these threats from union supporters to be enough to set aside the election because employees could reasonably fear pro-

union supporters would attempt to retaliate against non-supporters. Here, Myers reasonably believed that Dorton had the ability, based on objective facts that Dorton is a supervisor, could have an effect on her and other unit employees' job security, specifically Garcia.

The RD also argues that because Dorton is a "low-level" supervisor, no employee could reasonably interpret Dorton's statement at the Union meeting to be a threat. Then the RD engages in a subjective leap of logic by concluding that because of this, the employees reasonably interpreted Dorton's statement as Dorton "expressing her strong opinion on unionization and job security." (*See*, RD's Decision, page 5). The RD's subjective conclusion regarding the interpretation of Dorton's statement was in error as he completely ignored the record evidence presented by Employer's witness, Myers, who testified based on objective facts that she interpreted the statement as a threat of retaliation. Further, the Union failed to present any evidence to contradict Myer's testimony that the statement was interpreted as a threat by bargaining unit employees.

Despite there being no rebuttal or contradictory evidence presented by the Union regarding Dorton's statement, the RD took it upon himself to ignore, disregard, and contradict uncontroverted testimony by Myers. The RD's subjective leap of logic regarding the bargaining unit employees' interpretation of Dorton's statement was unwarranted and improper. Ultimately, there was no evidence presented at hearing which could lead the RD to the conclusion that Dorton's statement was merely an expression of her view that unionization would lead to job security. Accordingly, the RD's conclusion in this regard is not based on the facts presented at hearing or applicable law and must be overturned by the Board.

b. The RD Erroneously Determined That Dorton's Conduct Did Not Interfere With Freedom Of Choice To The Extent That It Materiality Affected The Outcome Of The Election.

The RD erred by not concluding that Dorton's threatening conduct interfered with the employees' free choice to make an untrammelled decision on the issue of unionization. In an election with only seven (7) eligible voters and a final tally of 4 to 2 for the petitioning labor organization, such a threatening comment made to the eligible voters clearly would have materially affected the outcome of the election. Based strictly on the Union's margin of victory, the Employer would have only needed a shift of one (1) vote to change the outcome of the election. When examining Dorton's threatening and coercive statement, a threat of job loss, retaliation, or reprisal by a supervisor is more likely than not to have a material effect on an employee's decision during a secret ballot election. In such a small bargaining unit of eligible voters, such a threat merely needs to have an impact on one (1) employee to change the outcome of the election.

Also, because this statement was made to the all of the eligible voters, except one (1), Dorton's threat of job loss if eligible voters failed and/or refused to sign the union authorization cards was clearly widespread within the eligible voting unit. This was not an isolated issue that was only heard or directed at one employee. Instead, this was a statement made to all the eligible employees except for one.

Lastly, as ruled in Harborside, because Dorton's conduct consisted of threats of job loss if the eligible employees did not sign a union authorization card, the conduct has a lingering effect. 343 NLRB 906, 913 (2004). The Board has a long standing precedent that threats of job loss are highly coercive and one of the most serious for of election misconduct. Waste Management, Inc., 330 NLRB 634, 634 fn. 22 (2000); Lake-Haven Nursing Home, 325 NLRB 250, 251 (1997). In

addition, testimony at hearing established that Dorton was an adamant union supporter, who assisted with scheduling meetings, communicating with the Union, and spoke in favor of the Union throughout the Union's organizing campaign. As a result of Dorton's ongoing support of the Union throughout its campaign, Dorton's conduct would have a lingering effect.

Accordingly, because of the close margin of victory, the widespread nature of Dorton's conduct, and the lingering effect of Dorton's conduct, taken together, the Board must determine the RD erred in failing to conclude that Dorton's conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election.

c. The RD Erred In Failing to Conclude Dorton's Solicitation of Signatures On Union Authorization Cards in of Itself Is Objectionable Conduct.

The RD erred by failing to conclude that Dorton's solicitation of signatures for union authorization cards in of itself is objectionable conduct because of Dorton's supervisory status over the drivers and over employees in the dispatch office, including unit employee Garcia. As the Board ruled in Harborside, supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom. Id. at 911. Dorton's supervisory authority over drivers as well as Garcia could affect the working life of employees. As a supervisor, Dorton's solicitation of cards gave her opportunity to obtain a graphic illustration of who is pro-union and, by the process of eliminating non-signers, who likely is not. Id. Accordingly, pursuant to the Board's well-established precedent in Harborside, Dorton's solicitation of signatures alone is objectionable conduct which reasonably interfered with the employees' right of free choice and the RD erred by failing to address this fact.

3. The RD Erred By Ignoring Controlling Precedent

Additionally, the RD's reliance on Glen's Market, 344 NLRB No. 25 (2005), for the blanket proposition that coercive supervisory conduct targeted towards one who is not the

supervisor's direct subordinate cannot be objectionable is in error. In Millard Refrigerated Servc., 345 NLRB 1143, 1145-46 (2005), the Board held that the decisions in Harborside and Glen's Market do not stand for the proposition that coercive supervisory conduct towards an employee who is not the supervisor's direct subordinate cannot be objectionable. The Board specifically stated:

Our dissenting colleague, citing Glen's Market, 344 NLRB No. 25 (2005), suggests that we should not "include" the solicitation of Elliott, because he was solicited by supervisor Rork rather than by his direct supervisor, Steen. We disagree. First, while it is true that supervisor Rork appears to have beaten supervisor Steen to the punch, so to speak, Elliott plainly testified that his supervisor, Steen, like Rork, was also busy soliciting and collecting cards. Thus, Elliott would reasonably conclude that his own supervisor, Steen, was as desirous of Elliott's signature as was Rork. Second, we do not view Glen's Market as standing for as broad a proposition as the dissent suggests. **In our view, neither Harborside nor Glen's Market stands for the proposition that supervisory conduct, no matter how coercive, targeted towards one who is not the supervisor's direct subordinate cannot be objectionable.** The principles of Harborside are not rendered inapplicable simply because prounion supervisors target their coercive conduct only at the subordinates of other prounion supervisors. (emphasis added).

Millard Refrigerated Servc., 345 NLRB 1143, 1145-46 (2005).

Thus, pursuant to the Board's ruling in Millard, the RD's citation of Glen's Market for the broad proposition that Dorton's coercive and threatening statement of retaliation could not be objectionable is a misapplication of well-established Board precedent. Whether Dorton was Myers' supervisor or not, such a coercive and threatening statement of retaliation could reasonably coerce or interfere with employees' free choice in the election.

Further, the Board held conduct similar to the conduct in the instant case was objectionable supervisory taint where several supervisors solicited union cards from employees, including those directly on their crew. Millard Refrigerated Servc., 345 NLRB No. 95 (2005). Even more similar, the Board in Millard held there was supervisory taint where one supervisor

told employees, “if the union does not get in, everybody will probably be fired” and that same supervisor told the group he would “make their lives a living hell” if they didn’t support the Union. Id.

The conduct and statements by supervisors discussed in Millard held to be objectionable conduct because of the threatening and coercive nature of the statements. Likewise here, Dorton’s pro-union conduct and statements were stated to a group of eligible employees, including an employee she directly supervises (Adela Garcia) and threatened the job security of the employees in order to induce the employees to sign authorization cards and support the Union. Clearly, when examining the nature, extent, and context of Dorton’s statement of “**If you want your job, you better sign this card**,” one must conclude that Dorton’s conduct constitutes objectionable supervisory taint. Accordingly, the Board should rule the RD erred by ignoring controlling Board precedent specifically established by the Board in Millard Refrigerated Servc., 345 NLRB 1143, 1145-46 (2005).

C. The RD Erred By Not Finding The Union Either Told Eligible Voters That The Employer Illegally Challenged Dorton And Corley’s Vote Because Of Their Race Or That The Union Failed To Repudiate An Employee’s Statement That The Employer Illegally Challenged Dorton And Corley’s Vote Because Of Their Race.

In the RD’s decision, the RD found that there was no competent evidence that prior to the election, the Union either told eligible voters that the Employer was going to illegally challenge Dorton and Corley’s vote because of their race or that the Union failed to repudiate an employee’s statement that the Employer illegally challenged Dorton and Corley’s vote because of their race. In support of this finding the RD stated that Smith, Union’s Business Agent admitted talking to eligible voters two nights before the election about the Employer’s intention to challenge Dorton’s and Corley’s vote. However the RD found that Smith did not admit the parties to the conversation discussed that the Employer’s intent to challenge was racially

motivated. Instead, the RD noted that when Smith was asked if parties to the conversation discussed the possibility that the Employer's intent to challenge was racially motivated, Smith only admitted that it was possible. The RD's determination that race was not referenced in relation to the Employer's decision to challenge ballots was erroneous and inconsistent with the record evidence.

Smith is African American. As such, it is logical to believe that if the issue of race were brought up during a conversation, Smith would remember it and if race was not brought up during a conversation, he would expressly deny that race was discussed. At hearing, however, Smith, when asked if he and eligible voters discussed that the Employer's decision to challenge ballots was racially motivated, stated, "It was possible." (TR 342). It defies common sense to believe that Smith would answer in such a manner if race was not discussed. Instead, if the parties did not discuss that the Employer's challenges were racially motivated, Smith would have responded to the above question with a negative response. As a result, it is beyond question that during the conversation between Smith and eligible voters two days before the election the participants to the call engaged in a discussion regarding the Employer's decision to challenge ballots being racially motivated.

As further support for the Employer's position in this respect, the Employer relies on the fact that Smith's business associate Bender fabricated notes regarding the Union's discussion with eligible voters regarding the Employer's decision to challenge ballots. Stated another way, the clear impetus for Bender's fabrication of notes was to provide the Union with a defense to the Employer's Objection regarding race. The bottom line is the Union knew that race was mentioned as a basis for the Employer's decision to challenge the ballots of Corley and Dorton during a phone call between Smith and eligible voters shortly before the election. The Union

further knew that Smith did not address the racial allegations or refute them in any way. Therefore, in order to argue that said conversation never took place the Union fabricated EX-27 so that the Union could argue that the issue of the challenged ballots came up during the Union meeting and the Union addressed said issue consistent with applicable law and in a non-coercive manner.

The Board in Sewell Mfg. Co., 138 NLRB 66 (1962), held that it would set aside elections when a party embarks on a campaign which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals. 138 NLRB at 72. While the Board in Shawnee Manor, 321 NLRB 1320 (1996), held the applicability of Sewell to third-party racial remarks that were made by a pro-union employee were not sufficient to set aside an election, such remarks possibly could be if they inflamed and tainted the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility. Id.

In the RD's decision, he cites Durham School Services, LP, 360 NLRB No. 86 (2014)¹⁰ and Beatrice Grocery Products, 287 NLRB 302 (1987), for the proposition that isolated, casual, prejudicial remarks do not warrant overturning an election. However, in both of the cases cited for such proposition by the RD, the isolated racial remarks were made many days before the election and did not involve such a small unit of employees. Here, the facts are clear that on May 7, 2015, the night before the secret ballot election, Dorton, Sherry Head, and Comandao, learned that the Employer was challenging the votes of Dorton and Corley (TR 616). During a phone conversation with Smith, someone raised the issue of racism by the Employer as the reason for

¹⁰ In Durham School Services, L.P., 360 NLRB No. 86 (2014), the Board reversed the Administrative Law Judge's decision in this matter because the Board found that the Employer engaged in objectionable conduct when, a week before the election, it responded to employee complaints about longstanding shortfalls in their paychecks by providing employees with cash payments equal to the amount of the shortfalls. Accordingly, the Board set aside the election and directed a second election. Despite the RD's contention, the Board did not address the issue regarding the Employer's alleged appeals to racial prejudice to dissuade groups of employees in its final decision.

challenging Dorton and Corley's votes (TR 342). Instead of rejecting and/or repudiating such statements or claims by one of the employees, Smith merely brushed it off (TR 342).

Additionally, the facts established at hearing clearly show the injection of race inflamed and tainted the atmosphere in which the election was held. At hearing, Comandao testified that prior to May 7, 2015, she had decided that she was going to vote no, but as a result of learning that the Company challenged Dorton and Corley's votes, she became very upset and changed her vote to a yes (TR 616-17). The Union's silence and failure to repudiate the injection of race as Employer's basis for challenging the votes the day before the secret ballot election clearly inflamed and tainted the atmosphere in which the election was held to the extent choosing or rejecting a bargaining representative in a reasoned manner was an impossibility for Comandao. Accordingly, the Board should find that the RD erred in finding that record contains no evidence that the Union or even an employee speculated about racist motivations behind the Employer's ballot challenges.

D. The Imposition of The New NLRB Rules and Regulations Violate the Employer's Rights and Prejudiced The Employer.

The RD erred in finding that the new NLRB rules are regulations do not violate the Employer's procedural due process rights and do not prejudice the Employer.¹¹ The imposition and implementation of the Board's new rules and regulations violated the Employer's procedural due process rights and prejudiced the Employer in these proceedings. For the reasons articulated by the Plaintiff's in their Complaints and other filings in Chamber of Commerce of the United States v. NLRB, 1:15-cv-00009 (D. D.C.2015); Assoc. Builders and Contractors of Texas, Inc. v.

¹¹ The RD initially argues that the Employer waived this argument because it did not bring this argument as an objection to the election or in its brief to the HO; however, the Employer was prevented from asserting such arguments in front of the HO. The HO does not have the authority to determine whether the implementation of the new NLRB rules violated the Employers's rights. HOs are merely fact finders who do not have the authority to determine such issues of law. Accordingly, the Employer could only bring such argument in front of the RD and subsequently to the Board.

NLRB, 1:15-cv-00026 (W.D.Tex.2015); and Baker DC, LLC v. NLRB, 1:15-cv-00571 (D.D.C.2015), the Employer objects to the application of the new NLRB Rules and Regulations, specifically entitled “Representation Case Procedures; Final Rule,” C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74, 439, effective April 14, 2015 (“the New Rule”) in these proceedings.

The imposition of the New Rule in these proceeding violated the Employer’s due process rights because the passage and imposition in representation proceedings was arbitrary and capricious under the Administrative Procedure Act. Imposition of the New Rule also unlawfully compelled the Employer to violate the personal privacy rights of its employees by forcing the disclosure of employees’ personal email addresses and phone numbers. The New Rules also unconstitutionally compelled the Employer to speech. The New Rule further compelled an election timeframe that interfered with the Employer’s rights under Section 8(c) of the National Labor Relations Act, as the Employer did not have adequate opportunity to exercise its right to free speech in the compressed timeframe imposed by the New Rule. This ultimately results in frustration of the bargaining unit employee’s Section 7 rights, as the lack of a full and fair debate on the relative merits of unionization frustrated their right to refrain under the Act.

Moreover, the Employer objects to the implementation of Sec. 102.69(a) of the New Rule which required the Employer’s Objections to be filed with the Regional Director with a written offer of proof within seven (7) days after the tally of ballots has been prepared with the regional director. Under prior rules, parties had fourteen (14) days from the preparation of the tally of ballots to submit an offer of proof in support of objections. The reduction of time for the Employer to file its Objections and offer of proof prevented the Employer from having the requisite time to properly preparing its Objections to be presented in front of the Hearing Officer.

Such a reduction of time for the Employer to obtain and present its evidence to support its Objections prejudiced the Employer.

The RD argues that the fact the Employer did not request an extension to submit its offer of proof and the fact the Employer presented evidence from eleven (11) witnesses during the hearing is evidence the Employer was not prejudiced by the reduced timeframe. However, the RD fails to acknowledge that such reduction of the timeframe prevented the Employer from having the requisite time to conduct a full investigation into objectionable conduct prior to filing objections, the offer of proof, and presenting evidence at hearing.

The Employer submits that the imposition of the New Rules in this matter materially affected the outcome of the election. Thus, the Employer respectfully requests that the Board reverse the RD's decision and certification of election on the grounds set forth herein.

V. CONCLUSION

For reasons set forth above, the Board should reverse the RD's decision and certification on election and sustain the Employer's Objections in their entirety, setting aside the results of the election held on May 8, 2015 and order a new election be held.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/ Geoffrey M. Gilbert

Geoffrey M. Gilbert
Dean Kpere-Daibo

Dated: August 12, 201

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2015, a true and correct copy of the above document was filed via electronically on the Board's website with the following individual:

Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington D.C. 0570-0001

_____/s/ Geoffrey M. Gilbert, Jr.

I FURTHER CERTIFY that on 12th day of August, 2015, this Employer's Request for Review to National Labor Relations Board of the Regional Director's Decision to overrule all the Employer's Objections was filed electronically and that service copies were sent via email (given the volume, exhibits will follow by FedEx) to:

George Velastgui
Regional Director
National Labor Relations Board, Region 32
1301 Clay St., Suite 300N
Oakland, CA 94612

Dalisai Nisperos
Beeson, Tayer & Bodine
483 Ninth Street, 2nd Floor
Oakland, CA 94607
dnisperos@beesontayer.com

_____/s/ Geoffrey M. Gilbert, Jr.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DURHAM SCHOOL SERVICES, L.P.
Employer

and

Case 32-RC-150090

TEAMSTERS LOCAL 853, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHANGE TO
WIN

Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Certification of Representative is denied as it raises no substantial issues warranting review.¹

KENT Y. HIROZAWA, MEMBER

LAUREN McFERRAN, MEMBER

Member Miscimarra, dissenting:

The Employer argues that the Board's Final Rule on representation case procedures violated its procedural due process rights and otherwise prejudiced the Employer, and frustrated employees' Section 7 rights. I expressed my disagreement with these procedures in my dissent to the Final Rule. 79 Fed.Reg. 74308, at 77430-74460 (Dec. 15, 2014) (dissenting views of Members Miscimarra and Johnson). In the instant case, for similar reasons, I would grant the Employer's Request for Review on the basis that it raises substantial questions regarding the effect and application of the Board's Final Rule. See *Pulau Corporation*, 363 NLRB No. 8 (2015) (Member Miscimarra, dissenting). In all other respects, I join my colleagues in denying review.

PHILIP A. MISCIMARRA, MEMBER

Dated, Washington, D.C., November 4, 2015.

¹ In denying the Employer's Request for Review, we agree with the Regional Director that the Employer untimely raised its argument challenging the validity of the Board's revised representation case procedures.


INTERNET
FORM NLRB-501
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C 3512

DO NOT WRITE IN THIS SPACE	
Case 32-CA-165556	Date Filed 12/04/2015

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Durham School Services	b. Tel. No. (510) 887-6005 c. Cell No. f. Fax No. (510) 887-6336 g. e-Mail rmahler@durhamschoolservices.com h. Number of workers employed
d. Address (Street, city, state, and ZIP code) 27577 Industrial Blvd., Suite A Hayward, CA 94545	e. Employer Representative Ronald Mahler, General Manager
i. Type of Establishment (factory, mine, wholesaler, etc.) Transportation provider	j. Identify principal product or service Transportation service
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Within the last 6 months, the above-named Employer has failed and refused to bargain with the Union.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Teamsters Local 853	
4a. Address (Street and number, city, state, and ZIP code) 2100 Merced Street San Leandro, CA 94577-3247	4b. Tel. No. (510) 895-8853 4c. Cell No. (510) 673-4475 4d. Fax No. (510) 895-6853 4e. e-Mail salvelais@teamsters853.org
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Brotherhood of Teamsters, Change to Win	
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (signature of representative or person making charge) Beeson, Tayer & Bodine 483 Ninth Street, 2nd Floor Oakland, CA 94607 Address	Dalisai Nisperos, Attorney (Print/type name and title or office, if any) 12/4/15 (date) Tel. No. (510) 625-9700 Office, if any, Cell No. Fax No. (510) 625-8275 e-Mail dnisperos@beesonayer.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

DURHAM SCHOOL SERVICES, L.P.

and

Case 32-CA-165556

TEAMSTERS LOCAL 853

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Teamsters Local 853 (the Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that DURHAM SCHOOL SERVICES, L. P. (Respondent) has violated the Act as described below.

1.

The charge in this proceeding was filed by the Union on December 4, 2015, and a copy was served on Respondent by mail on December 7, 2015.

2.

(a) At all material times, Respondent, a Delaware corporation with offices and places of business in Hayward, California and Livermore, California (the Facilities), has been engaged in the business of school bus transportation services.

(b) In conducting its operations during the 12-month period ending November 30, 2015, Respondent derived gross revenues in excess of \$250,000.

(c) In conducting its operations during the period of time described above in paragraph 2(b), Respondent purchased and received at the Facilities products, goods, and materials valued in excess of \$5,000 directly from points outside the State of California.

3.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

4.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5.

(a) The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time routers, payroll department employees, administrative employees, and dispatchers employed by Respondent at its facilities located at 27577 Industrial Boulevard, Suite A, Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California; excluding employees represented by a labor organization, professional employees, confidential employees, managers, guards, and supervisors as defined by the Act.

(b) On May 8, 2015, in Case 32-RC-150090, a representation election was conducted among the employees in the Unit at which the Union received a majority of the valid votes cast.

(c) On May 15, 2015, Respondent filed timely objections to the May 8, 2015 election.

(d) A hearing on Respondent's objections was held on June 2, 3, 4, 5 and 9, 2015, and on June 30, 2015, the Hearing Officer designated to hear those objections issued her report recommending that all of Respondent's objections be overruled.

(e) On July 14, 2015, Respondent filed timely exceptions to the Hearing Officer's report recommending dismissal of its objections.

(f) On July 29, 2015, the Regional Director for Region 32 of the Board issued his Decision and Certification of Representative in Case 32-CA-150090, in which he overruled Respondent's objections and its exceptions to the Hearing Officer's report and certified the Union as the exclusive collective-bargaining representative of the Unit.

(g) On August 12, 2015, Respondent filed with the Board a Request for Review of the Regional Director's July 29, 2015 Decision and Certification of Representative.

(h) On November 4, 2015, the Board denied Respondent's August 12, 2015 Request for Review.

(i) At all times since May 8, 2015, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

6.

About November 5, 2015, the Union, by letter, requested that Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the Unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. A copy of the Union's November 5, 2015 letter is attached hereto as **Exhibit 1**.

7.

About November 24, 2015, Respondent, by letter, declined to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit, and since that time, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit. A copy of Respondent's November 24, 2015 letter is attached hereto as **Exhibit 2**.

8.

By the acts and conduct described above in paragraph 7, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Sections 8(a)(1) and (5) of the Act.

9.

The unfair labor practices of Respondent described above affect commerce within the meaning of Sections 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for Respondent's unfair labor practices alleged above in paragraph 7, the General Counsel seeks an Order requiring Respondent to bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before January 4, 2016, or postmarked on or before January 3, 2016.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number,

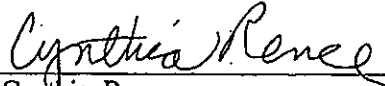
and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

In accordance with Section 10282.2 of the Board's Casehandling Manual Part One (Unfair Labor Practice Proceedings), **PLEASE TAKE NOTICE THAT** a hearing, if necessary,

will be conducted before an administrative law judge of the Board at a time, date and place to be determined in the future.

DATED AT Oakland, California this 21st day of December 2015.



Cynthia Rence
Acting Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments



TEAMSTERS LOCAL 853

AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS' JOINT COUNCIL #7
 2100 MERCED STREET • SAN LEANDRO, CALIFORNIA 94577
 TELEPHONE: (510) 895-8853 • (800) 400-1250 • FAX: (510) 895-6853
 email: connections@teamsters853.org

November 5, 2015

Rome A. Aloise
 Principal Officer
 Secretary-Treasurer

Bob Strello
 President

Bo Morgan
 Vice President

Stu Helfer
 Recording Secretary

Lou Valletta
 Trustee

John Thomas
 Trustee

Scott Gonsalves
 Trustee

Business Agents

Bob Strello

Dan Varela

Dennis Hart

Lou Valletta

Stu Helfer

Bo Morgan

Jesse Casquelro

Adolph Felix

John Arnolfo

Dan Harrington

Lon Schmidt

Efren Alarcon

Lennie Kuhls

Rodney Smith

Stacy Alvelais

Ray Torres

Bob Galves

Steve Beck

Mr. Ronald Mahler
 Durham School Services
 27577 Industrial Blvd., Suite A
 Hayward, CA 94545

CERTIFIED RRR
 7012 2920 0000 9632 5554

Re: Demand to Bargain and Request for Information

Dear Mr. Mahler

As you are aware, Teamsters Local 853 recently became the collective bargaining representative of your employees who work as full-time and regular part-time routers, payroll department employees, administrative employees and dispatchers at your Hayward and Livermore locations. I look forward to a long relationship with the Company that is based on mutual respect.

The Union hereby demands to bargain the terms and conditions of employment of the bargaining unit employees with the purpose of reaching a collective bargaining agreement. The Union further demands to bargain over all discretionary discipline.

The Union is available to negotiate on the following dates: December 9, 10 or the 11th. Please contact me as soon as possible to set dates and times to begin negotiations.

In order to prepare for the negotiations, Teamsters Local 853 hereby requests the following relevant and necessary information to be provided within the next 2 weeks by end of business day Friday the 20th of November,

- Names, addresses and phone numbers of all employees in the bargaining unit;
- Initial Date of hire for each unit employee along with the dates of any rehiring;
- The job title of all employees in the bargaining unit;
- The current hourly wage rate for each employee in the bargaining unit;
- The hourly wages earned by each employee in the bargaining unit over the past three years;

Representing Members in Warehousing, Dairy, Liquor, Bakery, Construction, Building Materials, Newspaper, Printing, Vending, Concession, Retail Delivery, Automotive, Retail, Graphic Communications, and Miscellaneous Industries



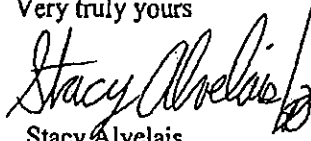
EXHIBIT 1

- Any promotions given to any bargaining unit employees within the past three years and attendant wage increases;
- A copy of documents showing or relating to the health benefits provided to the bargaining unit employees, including costs paid by the Company and the employee for coverage;
- A copy of any documents relating to pension plans, profit sharing plans, or 401(k) plans covering the bargaining unit employees and the amount paid into these plans by the Company;
- All documents outlining vacations, holidays, and any other terms and conditions of employment for these employees; and
- Copies of all personnel policies, work rules, codes of conduct, etc., that applies to the bargaining unit.

Finally, this letter will remind you that the Company is prohibited from making unilateral changes to the bargaining unit employees' terms and conditions of employment. You must first provide notice to and bargain with the Union prior to announcing or implementing changes to terms and conditions of employment.

I look forward to your prompt response to this letter.

Very truly yours

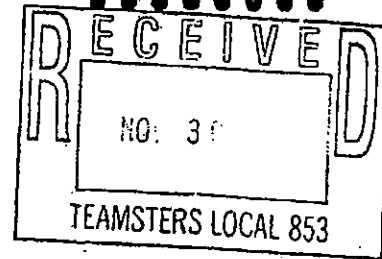
A handwritten signature in black ink, appearing to read "Stacy Alvelais", with a stylized flourish at the end.

Stacy Alvelais
Business Representative

national express

November 24, 2015

Ms. Stacy Alvelais
Business Representative
Teamsters Local 853
2100 Merced Street
San Leandro, CA 94577



Dear Stacy:

This correspondence is in response to your letter dated November 5, 2015, which was received in our offices on or about November 17.

The Company intends to exercise its right to challenge the National Labor Relation Board's ("NLRB") certification of the results of the election in Case No. 32-RC-150090. It has been and remains the Company's position that the May 8, 2015 election did not comply with the NLRB's mandated laboratory conditions and the Company's procedural due process rights were violated by the effect and application of the Board's New Final Rules.

For the reasons set forth in the Company's presentation of evidence and post-hearing submissions in Case No. 32-RC-150090, the election should have been set aside as a matter of law and a new election ordered.

As a result of the NLRB's improper certification, the Company has no obligation to recognize the International Brotherhood of Teamsters, Local 853 as the exclusive collective bargaining representative for all full-time and regular part-time routers, payroll department employees, office administrators, and dispatchers employed at its Hayward, California facility and respectfully declines to bargain over wages, hours and terms and conditions of employment.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard S. Cozza'.

Richard S. Cozza
Vice President and Assistant General Counsel



National Express LLC
4300 Weaver Parkway
Warrenville, IL 60555
Voice: 800.950.0485

EXHIBIT 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

DURHAM SCHOOL SERVICES, L.P.

and

TEAMSTERS LOCAL 853

Case(s) 32-CA-165556

Date: December 21, 2015

AFFIDAVIT OF SERVICE OF COMPLAINT AND NOTICE OF HEARING

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Ronald Mahler, General Manager
Durham School Services, L.P.
27577 Industrial Blvd., Suite A
Hayward, CA 94545-4044
VIA CERTIFIED MAIL
7015 0920 0001 7784.5110

James N. Foster, Jr.
McMahon Berger P.C.
2730 North Ballas Road, Suite 200
P.O. Box 31901
Saint Louis, MO 63131-3039
VIA REGULAR MAIL

Stacy Alvelais, Business Agent
Teamsters, Local 853
2100 Merced Street
San Leandro, CA 94577-3265
VIA REGULAR MAIL

Dalisai Nisperos
Beeson, Tayer & Bodine
483 Ninth Street, 2nd Floor
Oakland, CA 94607
VIA REGULAR MAIL

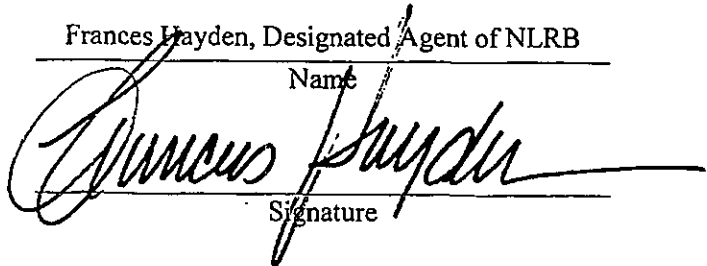
December 21, 2015

Date

Frances Hayden, Designated Agent of NLRB

Name

Signature



UNITED STATES OF AMERICA
BEFORE THE NATIONAL RELATIONS BOARD
REGION 32

DURHAM SCHOOL SERVICES, L.P.

and

Case 32-CA-165556

TEAMSTERS LOCAL 853

**DURHAM SCHOOL SERVICES'S ANSWER
TO THE COMPLAINT AND NOTICE OF HEARING**

Comes now Respondent, Durham School Services, Inc., ("Respondent" or "Durham"), by and through its undersigned attorneys, and submits this Answer and Defenses to the Region's Complaint and Notice of Hearing filed against it in the above-styled case, states as follows:

1. Respondent is without knowledge or sufficient information to form a belief as to the truth of when the Charge in this matter was filed by the Union. The Respondent admits to the remainder of the allegations contained in Paragraph 1 of the Region's Complaint.

2. (a) Respondent admits to the allegations contained in Paragraph 2(a) of the Region's Complaint.

(b) Respondent admits to the allegations contained in Paragraph 2(b) of the Region's Complaint.

(c) Respondent admits to the allegations contained in Paragraph 2(c) of the Region's Complaint.

3. Respondent admits to the allegations contained in Paragraph 3 of the Region's Complaint.

4. Paragraph 4 is not directed at Respondent. To the extent Respondent is obligated to

answer Paragraph 4, Respondent is without knowledge or sufficient information to form a belief as to the truth of the allegations in Paragraph 4 of the Region's Complaint, and therefore, denies the same.

5. (a) Respondent admits "the Unit" is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. However, Respondent does not waive its position that Lead Dispatcher, Michelle Dorton, is a statutory supervisor and her inclusion in "the Unit" is improper. Additionally, Respondent does not waive its position that Ms. Dorton used her supervisory status to taint the secret ballot election, and that the New NLRB Rules do not allow for the resolution of issues prior to the election.

(b) Respondent denies the allegations contained in Paragraph 5(b) of the Region's Complaint as the May 8, 2015 election did not comply with the NLRB's mandated laboratory conditions.

(c) Respondent admits to the allegations contained in Paragraph 5(c) of the Region's Complaint.

(d) Respondent admits the allegations contained in Paragraph 5(d) of the Region's Complaint. However, Respondent does not waive its position that the Hearing Officer improperly overruled Respondent's objections to the secret ballot election.

(e) Respondent admits to the allegations contained in Paragraph 5(e) of the Region's Complaint.

(f) Respondent admits the allegations contained in Paragraph 5(f) of the Region's Complaint. However, Respondent does not waive its position the Regional Director's Decision to certify the results of the election in Case 32-CA-150090 was improper and in error.

(g) Respondent admits to the allegations contained in Paragraph 5(g) of the Region's

Complaint.

(h) Respondent admits to the allegations contained in Paragraph 5(h) of the Region's Complaint. However, Respondent does not waive its position the Board's denial of Respondent's Request for Review was in error.

(i) Respondent denies the allegations contained in Paragraph 5(i) of the Region's Complaint. It is Respondent's position that the May 8, 2015 election did not comply with the NLRB's mandated laboratory conditions and the Company's procedural due process rights were violated by the effect and application of the Board's New Final Rules.

6. Respondent admits to the allegations contained in Paragraph 6 of the Region's Complaint.

7. Respondent admits to the allegations contained in Paragraph 7 of the Region's Complaint.

8. Respondent denies the allegations contained in Paragraph 8 of the Region's Complaint. Respondent asserts it has rightfully refused to recognize and bargain because it has no obligation to recognize and bargain with the International Brotherhood of Teamsters, Local 853 as the exclusive collective bargaining representative.

9. Respondent denies the allegations contained in Paragraph 9 of the Region's Complaint.

GENERAL DENIAL

Respondent denies each and every allegation of the Region's Complaint not specifically admitted herein.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

The Complaint and each purported claim for relief stated therein fail to allege facts sufficient to state a claim upon which relief may be granted.

SECOND DEFENSE

The Complaint fails to state a claim for relief as a matter of law as Respondent asserts it has rightfully refused to recognize and bargain because it has no obligation to recognize and bargain with the International Brotherhood of Teamsters, Local 853 as the exclusive collective bargaining representative.

THIRD DEFENSE

The Regional Director erroneously certified the results of the election in Case No. 32-RC-150090 as the May 8, 2015, election did not comply with the NLRB's mandated laboratory conditions.

FOURTH DEFENSE

The Regional Director erroneously certified the results of the election in Case No. 32-RC-150090 as the Company's procedural due process rights were violated by the effect and application of the Board's New Final Rules.

FIFTH DEFENSE

Respondent denies that the Charging Party is entitled to any relief requested in the Complaint.

SIXTH DEFENSE

The Board's New Final Rules implemented as of April 14, 2015, are similar and/or identical in nature to those proposals previously promulgated by acting General Counsel Lafe Solomon on April 26, 2012 and therefore are invalid.

SEVENTH DEFENSE

Because the presence of supervisory-taint prevented the holding of a free and fair election, the NLRB's elimination of any pre-election mechanism for addressing supervisory taint denies the employees and the employer procedural due process as well as fundamental fairness.

EIGHTH DEFENSE

All actions in which Respondent is alleged to have engaged constitute legally permissible activity within the meaning of Sections 8(a)(1), 8(a)(2), 8(a)(3), 8(a)(5), and 8(c) of the National Labor Relations Act.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/ James N. Foster, Jr.

James N. Foster, Jr.
Geoffrey M. Gilbert, Jr.
2730 North Ballas Road, Suite 200
St. Louis, MO 63131-3039
(314) 567-7350
(314) 567-5968 – fax

Attorneys for Respondent Durham
School Services, L.P.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 2016, a true and correct copy of the above document was filed via electronically on the Board's website with the following individuals:

Cynthia Rence
Acting Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

_____/s/ James N. Foster, Jr.

I further certify that on the 4th day of January, 2016, a true and correct copy of the above document was served via United States first class mail, postage prepaid, upon:

Delisai Nisperos
Beeson, Tayer & Bodine
485 Ninth Street, 2nd Floor
Oakland, CA 94607

_____/s/ James N. Foster, Jr.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

DURHAM SCHOOL SERVICES, L.P.

and

Case 32-CA-165556

TEAMSTERS LOCAL 853

MOTION FOR SUMMARY JUDGMENT

Comes now the General Counsel for the National Labor Relations Board (the Board) and alleges as follows:

1. On April 14, 2015, Teamsters Local 853 (the Union) filed a petition under Section 9(c) of the National Labor Relations Act, as amended (the Act), in Case 32-RC-150090, seeking to represent certain employees of Durham School Services, L.P. (Respondent) at Respondent's facility located at 72 Rickenbacker Circle, Suite A, Livermore, California 94551. [A copy of the Petition has been marked as *Exhibit 1* and attached hereto and made a part hereof, as are all of the documents marked as Exhibits and referred to hereinafter.]

2. On April 17, 2015, the Regional Director for the Thirty-Second Region of the Board (Regional Director) approved a Stipulated Election Agreement to conduct an election on May 8, 2015 in the following unit of employees (the Unit):

All full-time and regular part-time routers, payroll department employees, administrative employees, and dispatchers employed by the Employer at its facilities located at 27577 Industrial Boulevard, Suite A, Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California; excluding employees represented by a labor organization, professional employees, confidential employees, managers, guards, and supervisors as defined by the Act. [*Exhibit 2*].

3. On May 8, 2015, in Case 32-RC-150090, an election was conducted by secret ballot under the supervision of the Regional Director among employees in the Unit agreed-upon by Respondent and the Union and approved by the Regional Director in the Stipulated Election Agreement. On May 8, 2015, a Tally of Ballots issued indicating that a majority of the valid votes counted were cast for the Union. [*Exhibit 3*].

4. On May 15, 2015, Respondent filed timely objections to conduct affecting the results of the election and a written offer of proof in support thereof. [*Exhibits 4 and 5*]. Respondent argued that the election be set aside and that a second election be directed.

5. On May 19, 2015, the Regional Director issued an Order Directing Hearing and Notice of Hearing setting the hearing regarding Respondent's objections for June 1, 2015. [*Exhibit 6*].

6. On June 30, 2015, the Hearing Officer issued a Hearing Officer's Report on Objections in which she recommended that Respondent's objections be overruled in their entirety and that a Certification of Representative issue. [*Exhibit 7*].

7. On July 14, 2015, Respondent filed Exceptions to the Hearing Officer's Report on Objections and an Exceptions Brief with the Regional Director and argued that the Regional Director should reject the recommendations in the Hearing Officer's Report and argued for the first time that the Board's revised representation case procedures prejudiced Respondent's rights in these proceedings. [*Exhibits 8 and 9*].

8. On July 29, 2015, the Regional Director issued a Decision and Certification of Representative in which he rejected Respondent's Exceptions to the Hearing Officer's Report, including Respondent's untimely arguments regarding the validity of the Board's revised

representation case procedures, and certified the Union as the exclusive collective-bargaining representative of the employees in the Unit. [Exhibit10].

9. On August 12, 2015, Respondent filed a Request for Review of the Regional Director's Decision Overruling Respondent's Objections to the Election. [Exhibit11].

10. On November 4, 2015, the Board issued an order denying Respondent's Request for Review of the Regional Director's Decision and Certification of Representative as it raised no substantial issues warranting review. In denying Respondent's Request for Review, the Board noted that it agreed with the Regional Director that the Employer untimely raised its argument challenging the validity of the Board's revised representation case procedures. [Exhibit12].

11. At all times since May 8, 2015, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the employees in the Unit.

12. On November 5, 2015, by letter, the Union requested that Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the employees in the Unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. [Exhibit13].

13. On, November 24, 2015, by letter, Respondent declined to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the Unit as a means of testing the Board's Order in *Durham School Services, L.P.*, Case 32-RC-150090, and since that time Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the Unit. [Exhibit14].

14. On, December 4, 2015, the Union filed an unfair labor practice charge in Case 32-CA-165556, alleging that Respondent has failed and refused to bargain in good faith with the

Union as the exclusive collective-bargaining representative of the employees in the Unit.

[*Exhibit 15*]. The charge was served on Respondent on by mail on December 7, 2015.

15. On, December 21, 2015, the Regional Director issued and served a Complaint and Notice of Hearing in Case 32-CA-165556, alleging that since on or about May 8, 2015, and continuing to date, Respondent has failed and refused to recognize with the Union in violation of Section 8(a)(1) and (5) of the Act. [*Exhibit 16*].

16. On January 4, 2016, Respondent filed an Answer to Complaint, admitting, as alleged in the Complaint, that Respondent is refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the Unit, as a means of testing the Board's Order in *Durham School Services*, Case 32-RC-150090. [*Exhibit 17*].

17. In support of this Motion for Summary Judgment, the undersigned notes the following regarding the Complaint and Respondent's Answer herein:

(a) Respondent's Answer effectively admits the following paragraphs of the Complaint:

- (1) Paragraph 1. Filing and receipt of the charge.
- (2) Paragraph 2(a), 2(b), and 2(c): Jurisdictional facts.
- (3) Paragraph 3: The conclusion that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.
- (4) Paragraph 5(a): The appropriateness of the Unit under Section 9(b) of the Act.
- (5) Paragraph 5(c): That Respondent filed timely objections to the May 8, 2015 election.

- (6) Paragraph 5(d): That a hearing on Respondent's objections was heard and that a hearing officer was designated to hear those objections and issued her report recommending that Respondent's objections be overruled.
- (7) Paragraph 5(e): That on July 14, 2015, Respondent filed timely objections to the Hearing Officer's report recommending dismissal of its objections.
- (8) Paragraph 5(f) That on July 29, 2015, the Regional Director issued his Decision and Certification of Representative in Case 32-RC-150090, in which he overruled Respondent's objections and its exceptions to the Hearing Officer's report and certified the Union as the exclusive collective-bargaining representative of the employees in the Unit.
- (9) Paragraph 5(g): That on August 12, 2015, Respondent filed with the Board a request for review of the Regional Director's July 29, 2015 Decision and Certification of Representative.
- (10) Paragraph 5(h): That on November 4, 2015, the Board denied Respondent's August 12, 2015 Request for Review.
- (11) Paragraph 6: That on November 5, 2015, by letter, the Union requested that Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the of the employee in the Unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.
- (12) Paragraph 7: That on November 24, 2015, Respondent declined to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the Unit, and since that time, Respondent

has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the Unit.

(b) Respondent's Answer denies the following paragraphs of the Complaint:

- (1) Paragraph 4: The legal conclusion that the Union is a labor organization within the meaning of Section 2(5) of the Act, asserting that it is without knowledge or sufficient information to form a belief as to the Union's status.
- (2) Paragraph 5(b): The legal conclusion that on May 8, 2015, in Case 32-RC-150090, a representation election was conducted among the employees in the Unit in which the Union received a majority of the valid votes cast because the election failed to comply with the mandatory laboratory conditions for conducting an election, as raised by Respondent in its objections.
- (3) Paragraph 5(i): The legal conclusion that at all times since May 8, 2015, the Union has been the designated exclusive collective-bargaining representative of the Unit because the May 8, 2015 election did not comply with mandated laboratory conditions and because Respondent's due process rights were violated by the effect and application of the Board's New Final Rules.
- (4) Paragraph 8: The legal conclusion that Respondent has engaged in conduct in violation of Sections 8(a)(1) and (5) of the Act.

Respondent's Answer does not raise any bona fide issues of fact and, in essence, denies only the legal conclusions to be drawn from the factual allegations pleaded in the Complaint and admitted in Respondent's Answer thereto. Although in its Answer Respondent denied, on

information and belief, the status of the Union as a statutory labor organization, on April 17, 2015, in Case 32-RC-150090, Respondent signed a Stipulated Election Agreement [*Exhibit 2*] agreeing that the Union is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act. Moreover, Respondent's correspondence with the Union [*Exhibits 14 and 15*] further establishes that the Union is a Section 2(5) labor organization.

Concerning the Complaint, it is noted that each factual allegation therein is either directly admitted in Respondent's Answer or is indirectly but indisputably established by the attached Exhibits, as to which no doubt as to authenticity has been raised. Thus, Respondent concedes in its Answer that it has refused, and is refusing to recognize and bargain with the Union, and Respondent's correspondence with the Union [*Exhibit 15*] makes clear that Respondent is merely challenging the Regional Director's certification of the Union as the exclusive collective-bargaining representative of the employees in the Unit and the Board's Order denying Respondent's Request for review because it raised no substantial issues warranting review.

Where, as here, there are no factual issues warranting a hearing, it has long been the practice of the Board to grant Summary Judgment. *Henderson Trumbull Supply Corporation*, 205 NLRB 245 (1973); *Richmond, Division of Pak-Well*, 206 NLRB 260 (1973); *Tri-City Linen Supply*, 226 NLRB 669 (1976). In this regard, issues that have been or could have been raised at various stages of a representation proceeding may not be relitigated in a subsequent and related unfair labor practice case. See e.g., *Terrace Gardens Plaza, Inc.* *supra*; *Keydata Systems, Inc.*, 313 NLRB 636 (1994); *Seder Foods Corporation*, 286 NLRB 215 (1987); *Tri-City Linen Supply*,

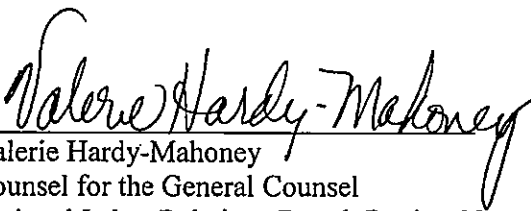
supra; *Ken Lee, Inc.*, 137 NLRB 1642 (1962); *O.K. Van & Storage, Inc.*, 127 NLRB 1537 (1960). In connection therewith, administrative notice is taken of official records in the underlying representation and unfair labor practice cases [*Frontier Hotel*, 265 NLRB 343 (1982); *LTV Electrosystems, Inc.*, 166 NLRB 938, enf'd. 338 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151, 34nfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp 573 (W.D. Va. 1967); *Follett Corp.*, 164 NLRB 378, enf'd. 378, enf'd. 397 F.2d 91 (7th Cir. 1968); Section 9(d) of the Act], and of correspondence between the parties in interest indicating that a bargaining demand has been made and refused (*Richmond, Division of Pak-Well*, supra).

In this case it is clear that Respondent fully raised its objections to the validity of the May 8, 2015 election in Case 32-RC-150090 at various stages during the proceedings in that case. These issues were considered and decided by the Board, and thus may not be relitigated in a subsequent unfair labor practice hearing. Respondent has not represented any newly discovered evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the underlying representation proceeding. In addition, since all of Respondent's affirmative defenses involve matters that have already been resolved in the underlying representation case, they are not proper defenses to the unfair labor practice allegations involved herein. Accordingly, summary judgment is appropriate.

WHEREFORE, in view of the matters set forth above, and upon consideration of the documents attached hereto and incorporated in this Motion, and as Respondent's Answer raises no issues of fact or law requiring a hearing in this proceeding, the undersigned prays that the Board find and conclude that Respondent has violated Sections 8(a)(1) and (5) of the Act and that it issue a Decision and Order in conformity with the allegations of the Complaint. To ensure

that the employees are accorded the services of their selected bargaining representative for the period provided by law, the undersigned requests that the initial period of the certification be construed as beginning on the date Respondent begins to bargain in good faith with the Union, as provided in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

DATED AT Oakland, California this 11th day of January 2016.


Valerie Hardy-Mahoney
Counsel for the General Counsel
National Labor Relations Board, Region 32
Oakland Federal Building
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

DURHAM SCHOOL SERVICES, L.P.

and

Case 32-CA-165556

TEAMSTERS LOCAL 853

**ORDER TRANSFERRING PROCEEDING TO THE BOARD
and
NOTICE TO SHOW CAUSE**

On January 11, 2016, the General Counsel filed with the National Labor Relations Board a Motion for Summary Judgment, on the ground that the Respondent is attempting to relitigate the issues in Case 32-RC-150090. Having duly considered the matter,

IT IS ORDERED that the above-entitled proceeding be transferred to and continued before the Board in Washington, D.C.

NOTICE IS GIVEN that cause be shown, in writing, filed with the Board in Washington, D.C., on or before January 27, 2016 (with affidavit of service on the parties to these proceedings), why the General Counsel's Motion should not be granted. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C., January 13, 2016.

By direction of the Board:

Gary Shinnors

Executive Secretary

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL RELATIONS BOARD
REGION 32**

DURHAM SCHOOL SERVICES, L.P.

and

Case 32-CA-165556

TEAMSTERS LOCAL 853

**DURHAM SCHOOL SERVICES'S MOTION IN OPPOSITION
TO ACTING GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGEMENT**

COMES NOW, pursuant to the Rules and Regulations of the National Labor Relations Board (hereinafter "the Board"), particularly Section 102.24(b), Durham School Services, L.P., (hereinafter referred to "Durham," the "Company," or the "Employer"), by its attorneys, and filed this Motion in Opposition to the Acting General Counsel's Motion for Summary Judgment, states as follows:

I. INTRODUCTION

The Employer opposes the General Counsel's Motion for Summary Judgment. As fully explained more fully below, the Union engaged in objectionable conduct during the critical period leading up to the May 8, 2015 secret ballot election, which included: (1) the requisite laboratory conditions for a fair election were not present for the May 8th secret ballot election because the pro-union conduct of Supervisor, Michelle Dorton ("Dorton") reasonably interfered with the eligible voters freedom of choice in the election; (2) the pro-union conduct of Dorton reasonably tended to interfere with the eligible voters' freedom of choice whether to sign or not to sign a union authorization card; (3) through agents and representatives, the Union coerced and threatened employees with being associated with unlawful activity by the exercise of a possible

ballot challenge by the Employer, even though the exercise of such right is both lawful and protected; and (4) through its agents and representatives, coerced and intimidated employees into voting yes by advising employees that the Employer's lawful challenge was going to prevent pro-union employees from having the opportunity to exercise their right to vote. Despite the Union's objectionable conduct, the Regional Director ("RD") erroneously certified the Results of Election finding the Union did not engage in objectionable conduct and that the Hearing Officer's rulings were free of prejudicial error.

The Acting General Counsel is correct that the Employer has fully raised its objections to the validity of the May 8, 2015 secret ballot election in Case 32-RC-150090 as fully argued in the Company's exhibits attached. However, as a result of the RD's failure and/or refusal to adhere to Board precedent and to apply the relevant and credible facts established at hearing, the Employer has clearly alleged special circumstances that would require the Board to reexamine the decision made in Case 32-RC-150090. Therefore, Summary Judgment is not appropriate.

II. SUMMARY JUDGMENT SHOULD BE DENIED AS THE BOARD ERRED IN CERTIFYING THE ELECTION IN CASE 32-RC-150090.

A. The RD Erred in Not Finding the Union Engaged in Objectionable Conduct.

Summary Judgment in this matter should be denied and the Board's Certification of Results of Election in Case 32-RC-150090 should be overturned, set aside and a new election ordered. As argued in the Employer's Exceptions to the Hearing Officer's Report and Request for Review of the Acting RD's Decision, the Board should deny the General Counsel's Motion for Summary Judgment because the RD erroneously determined that Ms. Dorton was not a 2(11) statutory supervisor. Evidence presented at hearing demonstrated Ms. Dorton has the supervisor authority to: (1) grant employees time off; (2) assign work to employees within the dispatch office, including an eligible voter in the bargaining unit; (3) give verbal reprimands and

counseling to employees; (4) direct the work of employees; (5) refers to herself as the “Lead Dispatcher”; and (6) other managers, supervisors, employees, and the Union unquestionably regard Ms. Dorton as a supervisor.

Additionally, Summary Judgment should be denied because the RD erred in finding that Ms. Dorton and the Union did not engage in unlawful Supervisory Taint. The RD departed from clear Board precedent in his decision. Specifically, the RD erred in not properly applying applicable Board precedent set forth in Harborside Healthcare, Inc., 343 NLRB 906 (2004) and Millard Refrigerated Services, Inc., 345 NLRB 1143 (2005), that the decisions in Harborside and Glen’s Market do not stand for the proposition that coercive supervisory conduct towards an employee who is not the supervisor’s direct subordinate cannot be objectionable. The RD improperly relied upon dicta and overly broad language in Glen Market, 344 NLRB No. 25 (2005), that coercive supervisory conduct targeted towards one who is not the supervisor’s direct subordinate cannot be objectionable. Such reliance was in error pursuant to the Board’s precedent in Millard.

The RD erred further by taking a subjective leap of logic regarding the bargaining unit employees’ interpretation of Ms. Dorton’s statement, “If you want your job, you better sign this card.” The RD ignored credible evidence presented at hearing that a bargaining unit employee actually heard and understood this statement to be a threat to the group of bargaining unit employees. Despite the credible evidence that a bargaining unit employee reasonably believed that Ms. Dorton had the ability to affect her and other unit employees’ job security, the RD erroneously determined Ms. Dorton’s words were not a threat and further concluded it was somehow merely an expression of her view that unionization would lead to job security. This

sophistry was a deviation from Board precedent and completely ignored the credible factual evidence presented at hearing.

Moreover, the General Counsel's Motion for Summary Judgment should be denied because the RD failed and/or refused to make an adverse inference against the Union for its failure and/or refusal to produce subpoenaed documents and subpoenaed Union witness testimony which resulted in prejudicial error. The RD also failed and/or refused to make an adverse inference against the Union for producing falsified and/or fabricated notes during hearing which also resulted in prejudicial error.

Lastly, the RD erred in determining the issue of race was not injected into the campaign by the Union. The facts at hearing demonstrated the Union either told eligible voters that the Employer was going to illegally challenge two employees' votes because of their race or that the Union failed to repudiate an employee's statement that the Employer illegally challenged two employees' votes because of their race. Again, the RD erroneously cited Durham School Services, LP, 360 NLRB No. 86 (2014)¹ and Beatrice Grocery Products, 287 NLRB 302 (1987), for the proposition that isolated, casual, prejudicial remarks do not warrant overturning an election, despite the critical facts at hand were dramatically distinguishable from the cases relied upon by the RD.

B. The RD Erred in Determining the Imposition of the New NLRB Rules and Regulations Did Not Violate the Employer's Rights and/or Prejudice the Employer.

Summary Judgment should be denied as special circumstances exist regarding the RD erroneously finding the New Final NLRB Rules did not violate the Employer's procedural due

¹ In Durham School Services, L.P., 360 NLRB No. 86 (2014), the Board reversed the Administrative Law Judge's decision in this matter because the Board found that the Employer engaged in objectionable conduct when, a week before the election, it responded to employee complaints about longstanding shortfalls in their paychecks by providing employees with cash payments equal to the amount of the shortfalls. Accordingly, the Board set aside the election and directed a second election. Despite the RD's contention, the Board did not address the issue regarding the Employer's alleged appeals to racial prejudice to dissuade groups of employees in its final decision.

process rights and did not prejudice the Employer. The Board's New Final Rules implemented as of April 14, 2015, are similar and/or identical in nature to those proposals previously promulgated by the acting General Counsel Lafe Solomon on April 26, 2012 and therefore are invalid. As a result of General Counsel Lafe Solomon's illegal service as General Counsel from January 5, 2011 to November 4, 2013, as well as the Board merely suspending the implementation of the representation case amendments as a result of General Counsel Solomon's improper service, the New Final Rules are voidable.

In addition, the imposition of the New Final Rule violated the Employer's due process rights because the passage and imposition of the New Final Rules was arbitrary and capricious under the Administrative Procedure Act. The New Final Rules further compelled an election timeframe that interfered with the Employer's rights under Section 8(c) of the National Labor Relations Act, as the Employer did not have adequate opportunity to exercise its right to free speech in the compressed timeframe imposed by the New Final Rules. This ultimately results in frustration of the bargaining unit employee's Section 7 rights, as the lack of a full and fair debate on the relative merits of unionization frustrated their right to refrain under the Act.

Moreover, the Employer objects to the implementation of Sec. 102.69(a) of the New Final Rules which require the Employer's Objections to be filed with the Regional Director with a written offer of proof within seven (7) days after the tally of ballots has been prepared with the Regional Director. Under prior rules, parties had fourteen (14) days from the preparation of the tally of ballots to submit evidence in support of Objections. The reduction of time for the Employer to file its Objections and evidence prevented the Employer from having the requisite time to properly prepare its Objections to be presented in front of the Hearing Officer. Such a

reduction of the time for the Employer to obtain and present its evidence to support its Objections prejudiced the Employer.

III. CONCLUSION

The Employer respectfully requests the Board to deny the Acting General Counsel's Summary Judgment. The Employer further respectfully requests the Board to order the Board's Certification of Results of Election in Case 32-RC-150090 be overturned, set aside and a new election ordered.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/ James N. Foster, Jr.
James N. Foster, Jr.
Geoffrey M. Gilbert, Jr.
2730 North Ballas Road, Suite 200
St. Louis, MO 63131-3039
(314) 567-7350
(314) 567-5968 – fax

Attorneys for Respondent Durham
School Services, L.P.

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2016, a true and correct copy of the above document was filed via electronically on the Board's website with the following individuals:

Gary Shinnars
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington D.C. 0570-0001

_____/s/ James N. Foster, Jr.

I further certify that on the 27th day of January, 2016, a true and correct copy of the above document was served via United States first class mail, postage prepaid, upon:

Valerie Hardy-Mahoney
Counsel for the General Counsel
National Labor Relations Board, Region 32
Oakland Federal Building
1301 Clay Street, Suite 300N
Oakland, CA 94612

Delisai Nisperos
Beeson, Tayer & Bodine
485 Ninth Street, 2nd Floor
Oakland, CA 94607

_____/s/ James N. Foster, Jr.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Durham School Services, L.P. and Teamsters Local 853. Case 32-CA-165556

February 19, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by Teamsters Local 853 (the Union), the General Counsel issued the complaint on December 21, 2015, alleging that Durham School Services, L.P. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union's certification in Case 32-RC-150090. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and asserting affirmative defenses.

On January 11, 2016, the General Counsel filed a Motion for Summary Judgment. On January 13, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a motion in opposition to the motion for summary judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification based on its objections to the election in the representation proceeding, which alleged that the Union and its agents or representatives engaged in objectionable conduct and that the imposition and implementation of the Board's revised representation case procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014), violated the Respondent's procedural due process rights and otherwise prejudiced the Respondent and frustrated employees' Section 7 rights.¹

¹ In denying the Employer's request for review of the Regional Director's Decision and Certification of Representative on the basis that it raised no substantial issues warranting review, the Board stated that it agreed with the Regional Director that the Employer untimely raised its argument challenging the validity of the Board's revised representation

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with offices and places of business in Hayward, California, and Livermore, California (the facilities), has been engaged in the business of school bus transportation services.

In conducting its operations during the 12-month period ending November 30, 2015, the Respondent derived gross revenues in excess of \$250,000 and purchased and received at its facilities products, goods, and materials valued in excess of \$5000 directly from points outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on May 8, 2015, the Union was certified on July 29, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

case procedures. *Durham School Services, L.P.*, Case 32-RC-150090, unpublished Order issued November 4, 2015, at 1 fn. 1.

Member Miscimarra expressed his disagreement with these procedures in his dissent to the Final Rule. 79 Fed. Reg. 74308, at 77430-74460 (Dec. 15, 2014) (dissenting views of Members Miscimarra and Johnson). He would have granted review in the underlying representation proceeding on the basis that it raised substantial questions regarding the effect and application of the Board's Final Rule. See *Pulan Corp.*, 363 NLRB No. 8 (2015) (Member Miscimarra, dissenting). While Member Miscimarra remains of that view, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. In light of this, Member Miscimarra agrees with the decision to grant the Motion for Summary Judgment.

² The Respondent's motion in opposition to the Motion for Summary Judgment is therefore denied.

All full-time and regular part-time routers, payroll department employees, administrative employees, and dispatchers employed by the Employer at its facilities located at 27577 Industrial Boulevard, Suite A, Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California; excluding employees represented by a labor organization, professional employees, confidential employees, managers, guards, and supervisors as defined by the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About November 5, 2015, the Union, by letter, requested that the Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

About November 24, 2015, the Respondent, by letter, declined to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit and since that time the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about November 24, 2015, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57

(10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Durham School Services, L.P., Hayward and Livermore, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Teamsters Local 853 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time routers, payroll department employees, administrative employees, and dispatchers employed by the Employer at its facilities located at 27577 Industrial Boulevard, Suite A, Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California; excluding employees represented by a labor organization, professional employees, confidential employees, managers, guards, and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facilities in Hayward and Livermore, California, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DURHAM SCHOOL SERVICE, L.P.

3

by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 24, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 19, 2016

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Teamsters Local 853 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time routers, payroll department employees, administrative employees, and dispatchers employed by us at our facilities located at 27577 Industrial Boulevard, Suite A, Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California; excluding employees represented by a labor organization, professional employees, confidential employees, managers, guards, and supervisors as defined by the Act.

DURHAM SCHOOL SERVICES, L.P.

The Board's decision can be found at www.nlr.gov/case/32-CA-165556 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

